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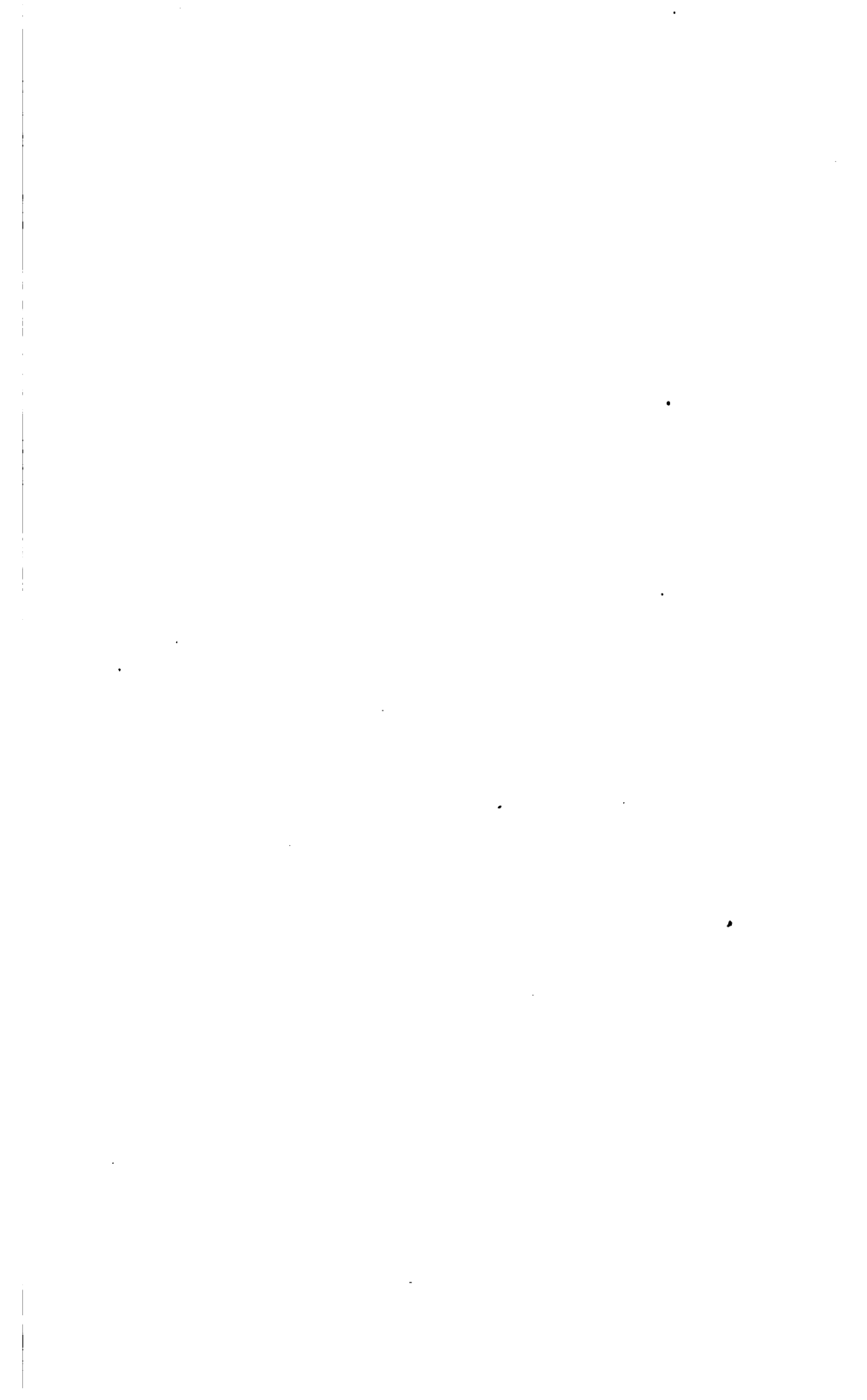
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REPORTS OF CASES
DECIDED IN THE
SUPREME COURT

OF THE
STATE OF OREGON

FRANK A. TURNER
REPORTER

VOLUME 77

DECISIONS RENDERED BETWEEN JULY 6, 1915, AND OCTOBER
22, 1915

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1916

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IN THE STATE OF OREGON

October 22, 1915.

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Douglas }
Benton } JAMES W. HAMILTON, Roseburg.
Lane }
Lincoln } GEORGE F. SKIPWORTH, Eugene.

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Marion } WILLIAM GALLOWAY, Department No. 2, Salem.

Fourth Judicial District—

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land.
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Umatilla } GILBERT W. PHELPS, Pendleton.

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Wasco } WILLIAM L. BRADSHAW, The Dalles.

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Ninth Judicial District—

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Wallowa		

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Sherman		
Wheeler		

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Yamhill		

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Lake	BERNARD DALY, Lakeview.
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Jefferson		

Nineteenth Judicial District—

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Washington		

Twentieth Judicial District—

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Columbia		

DISTRICT ATTORNEYS

IN THE

STATE OF OREGON

October 22, 1915.

County.	Name.	Official Address.
Baker.....	Godwin, C. T.....	Baker
Benton.....	Clarke, Arthur.....	Corvallis
Clackamas.....	Hedges, Gilbert L.....	Oregon City
Clatsop.....	Mullins, C. W.....	Astoria
Columbia.....	Cooper, W. H.	St. Helens
Coos.....	Liljeqvist, Lawrence A.....	Coquille
Crook.....	Wirtz, Willard H.....	Prineville
Curry.....	Johnson, James C.	Gold Beach
Douglas.....	Neuner, Jr., George.....	Roseburg
Gilliam.....	Weinke, T. A.....	Condon
Grant.....	Cozad, V. G.....	Canyon City
Harney.....	Sizemore, Geo. S.....	Burns
Hood River.....	Derby, A. J.....	Hood River
Jackson.....	Kelly, E. E.....	Medford
Jefferson.....	Myers, W. F.....	Culver
Josephine.....	Miller, W. T.....	Grants Pass
Klamath.....	Irwin, John.....	Klamath Falls
Lake.....	Gibbs, O. C.....	Lakeview
Lane.....	Devers, Joseph M.....	Eugene
Lincoln.....	Stewart, J. F.....	Toledo
Linn.....	Hill, Gale S.....	Albany
Malheur.....	Brooke, W. H.....	Ontario
Marion.....	Ringo, Ernest B.....	Salem
Morrow.....	Wells, Glenn Y.....	Heppner
Multnomah.....	Evans, Walter H.....	Portland
Polk.....	Sibley, Joseph E.....	Dallas
Sherman.....	Huddleston, C. M.....	Wasco
Tillamook.....	Goynes, T. H.	Tillamook
Umatilla.....	Steinwer, Frederick H.....	Pendleton
Union.....	Eberhard, Colon B.	La Grande
Wallowa.....	Corkins, O. M.....	Enterprise
Wasco.....	Bell, W. A.....	The Dalles
Washington.....	Tongue, E. B.....	Hillsboro
Wheeler.....	Starr, J. K.....	Fossil
Yamhill.....	Conner, R. L.....	McMinnville

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CASES DECIDED
IN THE
SUPREME COURT
OF
OREGON.

Argued May 4, affirmed July 6, 1915.

EVANSEN *v.* GRANDE RONDE LUMBER CO.

(149 Pac. 1035.)

Master and Servant—Employers' Liability Act—Prior Statute.

1. Where the administrator of a servant of a lumber company, which operated a railroad, killed in the course of his employment on defendant's train, sued to recover \$7,500 damages for the death, the provisions of the Employers' Liability Act (Laws 1911, p. 16), were thereby waived, and reliance placed upon the statute in force prior to such act, Section 6946, L. O. L., regulating the liability of railroad companies for injury to employees, thus rendering the defenses of assumption of risk and negligence of fellow-servant, permissible under such statute, available to the defendant employer.

Evidence—Opinion—Expert—Logging Company Employee.

2. The superintendent of a logging company's railway was competent to testify whether it was necessary for members of the crew of a logging train to travel over the cars when in motion in the discharge of their duties, since men in railroad service may express opinions upon questions in relation thereto, involving matters not within the knowledge of ordinary jurors.

[As to when the opinions of nonexperts are admissible, see note in 30 Am. St. Rep. 38.]

Appeal and Error—Harmless Error—Evidence—Necessary Methods of Work.

3. In an action against a logging company, which operated a logging railroad, for the death of its servant on a train, where defendant's superintendent was allowed to testify that it was not necessary for any of the train crew to travel over the cars while in motion, the admission of such opinion evidence was not prejudicial to plaintiff, since the fact that the service, being rendered by the servant in traveling over the train while in motion, could have been performed in a different manner when the train was at a standstill, did not disprove that such servant followed the usual and ordinary course of his employment in so doing.

Master and Servant—Death of Servant—Evidence—Negative Testimony.

4. In an action against a logging company, operator of a railroad, for the death of a servant through the breaking of a chain, securing logs to a car in motion, testimony of defendant's logging and railway superintendent that, during the 12 years he had been with defendant, he had never known a chain to break, except on that one occasion, was not inadmissible under the rule that the negative testimony of a witness that he did not see an occurrence ordinarily affords no evidence, since such rule has no application to one whose duty, as superintendent of a business or department thereof, is to observe and note the happening of events tending to promote or retard work.

Appeal and Error—Presumptions—Qualification of Expert.

5. In an action against an employer for death of a servant by the breaking of a chain securing logs on a train, where the defendant logging company's superintendent was allowed to give his opinion in evidence as to the strength of wire with which broken chains were repaired, as compared with the strength of a link, and where, on appeal, the bill of exceptions set out no testimony as to the witness' qualifications as an expert on the point, except that he had had many years' experience as defendant's superintendent, the court would assume that he was qualified, and that the jurors had no general knowledge of the subject testified to.

Master and Servant—Duty to Servant—Safe Appliances—Long Use of Implement.

6. An appliance, such as a chain used in securing logs to a railroad car, that has been used for a long time in safety, may be continued in use without imputation of want of care to the employer thereby, if such appliance has not become obviously dangerous.

Master and Servant—Duty to Servant—Inspection of Appliance.

7. The purchase, by an employer, of chains to be used by his servants to secure logs to a railroad car, from a reputable manufacturer of chains for such purpose, did not relieve the employer of his duty to the servants of inspection by a competent person as to the fitness and safety of the articles for the use.

[As to duty of master to inspect common or simple tools, see note in Ann. Cas. 1912A, 1004.]

Master and Servant—Injuries to Servant—Sufficiency of Evidence.

8. In an action for death of an employee on a logging company's train, evidence *held* sufficient to support finding that company was not negligent as charged.

Death—Action—Party Entitled to Sue—Administrator.

9. The administrator of a deceased employee is incompetent to maintain an action against the employer for damages, for the death, when it is alleged to have been caused by such employer's negligence.

From Union: JOHN W. KNOWLES, Judge.

In Banc. Statement by Mr. CHIEF JUSTICE MOORE.

This is an action by P. Evansen, as administrator of the estate of Andrew Brodreskift, deceased, against the Grande Ronde Lumber Company, a corporation, to recover damages resulting from the death of the plaintiff's intestate, which it is alleged was caused by the defendant's negligence in that there was a failure to provide a safe place in which brakemen, employed on a logging train, were required to perform the services demanded of them, in not suitably inspecting the cars, chains, fasteners and appliances used in connection with the train, in not keeping instrumentalities in good repair, and in not using sufficient chains upon cars to hold logs safely thereon, in consequence of which Andrew Brodreskift was thrown from a car of logs and instantly killed, to the damage of his estate in the sum of \$7,500. The answer denied the negligence charged, and averred in effect that the deceased was an experienced brakeman who knew and assumed the dangers incident to his employment; that the injury resulted from an unavoidable accident, unless it was caused by the contributory negligence of Brodreskift; and that, if there was any carelessness on the part of anyone other than the deceased, it was the negligence of fellow-servants. A demurrer to the answer on the ground that it did not state facts sufficient to constitute a defense was overruled, whereupon the reply put in issue the averments of new matter in the answer. Based upon the issues thus formed, the cause was tried, resulting in a verdict and judgment for the defendant, and the plaintiff appeals. **AFFIRMED.**

For appellant there was a brief with oral arguments by *Mr. George T. Cochran* and *Mr. Colon R. Eberhard*.

For respondent there was a brief and an oral argument by *Mr. Charles H. Finn*.

Opinion by MR. CHIEF JUSTICE MOORE.

1. It is maintained that an error was committed in overruling the demurrer. The defenses interposed are allowable, unless the Employer's Liability Act has eliminated them. When an action is brought by an administrator to recover damages for the death of his intestate, alleged to have been caused by the defendant's negligence, and the amount of the judgment demanded is limited to \$7,500, it is believed that the provisions of the Employer's Liability Act are thereby waived, and reliance is placed upon the statute as it existed prior to the enactment referred to, thus rendering the cause of action liable to the defenses set up herein: Section 6946, L. O. L. No error was committed as alleged.

The evidence shows that the defendant owns at Perry, Oregon, a sawmill, where it manufactures lumber from logs which are cut in the Blue Mountains and transported over the defendant's railway to Hilgard, and thence over the line of the Oregon-Washington Railway & Navigation Company to the mill. The grade of the defendant's railway is quite steep in some places, and, in order safely to transport logs, the flat cars used for that purpose contain air-brakes that are operated by the engineer in charge of the locomotive. Each car has a supplemental reservoir, called a retainer, which when filled with air from the engine, will maintain adequate pressure upon the brakes from four to eight minutes. The vehicles used for hauling logs are flat cars usually longer than the load transported. Near each end of the cars are placed iron cross-bunk-

ers, in each end of which are inserted short iron standards. A derrick is generally employed to load on cars logs, only two of which, if large, are placed in the lower course, but, if smaller logs are taken, three are then used. Across the lower layer of logs on each car extend chains, called wrappers, that are fastened to clevises in the iron standards, and wooden wedges are driven beneath the outer logs in order to tighten the wrappers so as to keep the load from slipping on the deck of the cars. When reaching the level, after descending the mountains with a train-load of logs, it was occasionally the practice of brakemen to pass over cars and turn down the retainers, thereby allowing the compressed air to escape. On December 22, 1913, as a train loaded with logs, having the locomotive in front backing, had nearly reached the level, the engineer, glancing back, saw Brodreskift walking toward him on the top of logs, and soon thereafter the engineer, again looking in that direction, observed logs falling, whereupon he immediately halted the train, and employees going back found Brodreskift lying on the ground, having sustained a fracture of the base of the skull, from the effects of which he instantly died. It was further discovered that the wrapping chain on the front end of a car had been broken about three links from the standard on the right side, and that the rear standard on the left side was also broken. Whether Brodreskift fell from the car, or jumped, or was thrown off, is not known. When found, he was lying with his head toward the car, and about six feet from it. No fallen log was nearer than two feet from him. His hat, however, was found on the ground among the logs. The testimony of plaintiff's witnesses tended to show that, at the time Brodreskift lost his life, he

was employed by the defendant as a brakeman upon its logging train, and was performing his required duties in going over the loaded cars while in motion to release the retainers, thereby preventing the train from being halted on the level, when the wrapping chain broke, and he was killed.

2, 3. Ed Bean, the superintendent of the defendant's logging department and railway, testified that he had charge of this branch of the work; that he was absent from December 1, 1913, to February 1, 1914, but before leaving he had issued verbal rules and instructions to the employees engaged in the train service, which rules were in effect when he returned; that these instructions were obeyed; and that it was not the duty of any of the train crew to travel over the cars while in motion. In this connection he was asked: "State whether or not it was necessary for them [referring to members of the train crew] to travel over the cars when they were in motion." An objection, interposed to this command on the ground that the answer sought was incompetent, irrelevant and immaterial, was overruled, and an exception allowed, whereupon the witness answered, "It was not"; and it is contended that an error was thereby committed.

It is argued that the question to be considered was whether or not it was the duty of the deceased to pass over loaded cars when they were in motion, and that in permitting Bean, who did not see the accident, to state upon oath that there was no necessity for a brakeman to travel over moving cars loaded with logs, was allowing the witness to express an opinion upon a matter not requiring any particular skill, thereby disclosing the competency of the jury to determine the matter. Did the wrapper chain break by reason of the

defendant's negligence? was the principal issue to be determined. After the happening of almost any accident, alleged to have been caused by negligence, it is possible for interested persons to testify that some other method of performing the work in which the servant was engaged when he was hurt could have been pursued; and hence it was unnecessary for him to have taken the position which he occupied at the time he was injured. It is manifest from the testimony that in order to prevent the train from coming to a standstill when it reached the level, after descending the mountain, it was expedient, at least, that the retainers should be turned down when the cars were in motion. "Necessity," as the term was used in the question complained of, evidently meant an inquiry as to whether or not it was indispensable that the retainers should be turned down when the cars were in motion, or whether some other method could have been adopted or some different condition of the train selected where the pressure upon the brakes could have been safely released. It is possible that such service could have been performed in a manner different from that pursued by Brodreskift, but because this might have been done does not disprove the fact that he followed the usual and ordinary course in discharging a duty.

Men engaged in the railroad service are experts in that branch of transportation, and may express opinions upon questions in relation thereto when the inquiry involves matters not within the knowledge of ordinary jurors: *Lawson, Ex. Ev.* (2 ed.), p. 91.

In *Galveston etc. R. Co. v. Bohan* (Tex. Civ. App.), 47 S. W. 1052, 1053, it was decided that a witness who was an expert in the case of railroad tracks, and had

had many years' experience as section foreman, was competent to testify as to the necessity of a track walker in a particular freight-yard, although he had not worked in such yard within two years. In deciding that case, Mr. Chief Justice GARRETT remarks:

"The engineer, fireman, brakeman, conductor, section foreman and experienced men in other departments may testify as to what is usual, customary or necessary to be done in their special lines of work."

In *Nowell v. Wright*, 3 Allen (Mass.), 166 (80 Am. Dec. 62), it was ruled that, in receiving the opinion of tenders of drawbridges as to the necessity of keeping the gates of the bridge shut and hanging out lanterns while the draw was open in the night-time, the trial court committed error.

In *Chicago etc. R. Co. v. Cummings*, 24 Ind. App. 192 (53 N. E. 1026), which was an action to recover damages caused by the defendant's alleged negligence in unnecessarily sounding a locomotive whistle, it was held that the opinion of an engineer that the blowing of a whistle at the time and place mentioned was unnecessary was incompetent.

In *Lane v. New York etc. R. Co.*, 93 App. Div. 40 (86 N. Y. Supp. 947), in allowing an expert witness to testify that rules suggested by him were necessary, it was determined that an error had been committed, and that it was competent for the jury, when all the facts and circumstances bearing upon the situation had been placed before them, to determine the question for themselves.

In *New York Electric Equipment Co. v. Blair*, 79 Fed. 896 (25 C. C. A. 216), which was an action to recover damages alleged to have been caused by the defendant's negligence in hoisting pipes, it was con-

cluded not to be competent for a witness, called as an expert, to state whether it was necessary, in the proper performance of duty in hoisting pipe, that certain specified precautions should be taken, since the question was one which the jury could determine upon a statement of the facts. To the same effect, see, also, *Meyers v. Highland M. Co.*, 28 Utah, 96 (77 Pac. 347).

It is quite probable that, if directly asked, Mr. Bean could have said the retainers might have been turned down when the train came to a stop for that purpose; but, however this may be, the witness, as superintendent of the defendant's railway and logging department, was undoubtedly qualified to express an opinion, and, having testified that it was unnecessary for the brakeman to pass over the loaded cars when in motion, it is not believed that the answer to the question objected to prejudiced the plaintiff's rights.

4. The witness Bean was permitted, over objection and exception, to testify that during the 12 years he had been employed by the defendant he had never known a wrapper chain to be broken while a train of cars loaded with logs was descending the mountains, except in the particular instance when Brodreskift was injured, and it is insisted that an error was thereby committed. It is argued that Bean was absent from the logging camp about three months during which time the injury complained of occurred; that it does not appear that he accompanied the train on each trip that was made; and that this species of proof is an attempt to make the superintendent's lack of knowledge positive evidence of due care. It must be conceded that negative testimony, if permitted to be given by a person who did not perceive a fact, the existence of which is the subject of judicial investigation, ordinar-

ily affords no evidence that the incident did not occur as alleged. The testimony of a single reputable witness, who states that he saw a crime committed by the person charged therewith, will outweigh the testimony of a multitude, who may assert that they did not see the person charged perpetrate the offense. This rule of evidence, however, can, upon principle, have no application to a person whose duty, as superintendent of a business enterprise or a department thereof, is to observe and note the happening of events which tend to promote or retard the work in which he is engaged, in order that he may guard against a repetition of the incidents which hinder the operation.

It was the particular province of Mr. Bean to know whether or not a wrapper chain had ever been broken when a loaded train was descending the mountain, and his testimony on that subject was proper, assuming, as we must, that ample opportunity was given for cross-examination as to his means of acquiring the information of which he testified.

5. The testimony received tended to show that, in loading logs after the lower layer had been placed on the cars and secured by wrappers, other logs put on the top of the load would be dropped some distance, occasionally breaking the chains, which fractures were temporarily repaired at the logging camps by improvised links made of baling wire. In referring to such repairs, Mr. Bean was asked: "And what was the relative strength of that mass of baling wire between the links in comparison with the link?" An objection to the inquiry made on the ground that it was incompetent, irrelevant and immaterial, and that the witness was not shown to be qualified to answer the question, was overruled, and the superintendent replied: "It

made it stronger than the link." It is maintained that the answer given interfered with the province of the jury, and was erroneous.

The bill of exceptions does not purport to set out any of the testimony tending to show what Mr. Bean's qualifications as an expert were, except that he had many years' experience as the defendant's superintendent. From this circumstance alone, and in the absence of any testimony on the subject, it will be taken for granted that he was competent and qualified to state the relative strength of the wire link, and that ordinary jurors had no general knowledge of the subject.

6. George Stoddard, the defendant's general manager, in referring to the chains used as wrappers, was permitted, over objection and exception, in answer to the question, "Where did you get them?" to say:

"They come through the Marshall-Wells Hardware Company of Portland.

"Q. What are these chains called in commerce?

"A. American steel-proof test-proof chains.

"Q. Do you know whether they are blacksmith-made or factory-made?

"A. I suppose factory-made. * *

"Q. Now, then, you may state from your knowledge whether these chains come from a reputable factory for making chains of that character.

"A. Yes, they do."

Based on this and other testimony the court charged the jury as follows:

"I instruct you that it is the master's duty to exercise reasonable care only. It is not sufficient to show that defendant might have had better or safer machinery or methods than the ones it uses, nor was he bound to adopt every latest improvement. It is a well-settled rule that, when an appliance has been in daily use

for a long time and proved safe, (and) its use may continue without the imputation of want of care. So that if you find from the testimony that the chains used by defendant in this case in binding its logs on its cars broke at time of such accident, and that the same caused the death of Andrew Brodreskift, and you further find that such chain was purchased of a reputable manufacturer, manufactured for the purposes defendant used same, and that such breakage was from some hidden defect which was undiscoverable by ordinary inspection, then the defendant was not guilty of negligence, and your verdict should be for defendant."

An exception having been taken to this instruction, it is contended that an error was committed in giving it. An examination of the language employed will show that if the word "and," indicated by parentheses, be retained, a part of the sentence was evidently omitted by the official reporter. If, however, the stenographer inadvertently included that word the remaining part of that sentence, "its use may continue without the imputation of want of care," as a declaration of a legal principle, is not universally true. A chain may have been in daily use for a long time and proved safe, and yet such employment so impaired its strength that a continuation of the use would become extremely dangerous. The idea undertaken to be expressed by the language referred to was evidently obtained from the case of *Sappenfield v. Main St. etc. R. R. Co.*, 91 Cal. 48, 57 (27 Pac. 590, 592), where it is said:

"It is a well-settled rule that when an appliance or machine, not obviously dangerous, has been in daily use for a long time, and has uniformly proved safe and efficient, its use may be continued without the imputation of imprudence or carelessness."

The rule thus referred to may be controlling in some cases, but the omission from the instruction challenged of the phrase "not obviously dangerous," as set forth in a part of the opinion quoted, renders the charge complained of inapplicable. It is possible that a careful examination of the links would have disclosed that use had not worn them, and for that reason the chain was not obviously dangerous. But, however this may be, the part of the charge to which attention has been called did not correctly state the law.

7. The purchase of a chain from a reputable manufacturer who makes such instrumentalities for the purpose for which it was used by the defendant did not avoid the necessity of a careful examination of each link by some person competent to judge of its fitness for the utmost strain that was likely to be placed upon the chain: *Morton v. Detroit etc. R. Co.*, 81 Mich. 423, 433 (46 N. W. 111).

The instruction complained of, and many other alleged errors that have been assigned, have been carefully considered; but when viewed in connection with the entire testimony, instructions, etc., which are attached to and made a part of the bill of exceptions, it is believed that no prejudicial error was committed at the trial.

8. No person saw Andrew Brodreskift when he was hurt, and, as he instantly died, it was impossible for plaintiff's counsel accurately to determine the proximate cause of his injury. A careful examination of the entire testimony convinces us that, notwithstanding the matters referred to as alleged errors, the jury properly determined that the defendant was not negligent, as averred in the complaint.

9. Since this opinion was written, the case of *Niemi v. Stanley Smith Lumber Co.*, *post*, p. 221 (149 Pac. 1033), has been decided on rehearing, holding an administrator an incompetent party to maintain an action to recover damages for the death of his intestate, when alleged to have been caused by the negligence of his employer.

Observing the rule established in that case, we conclude that the plaintiff herein was not entitled to maintain this action, and as to him the judgment must be and is affirmed.

AFFIRMED.

Argued June 10, affirmed July 6, 1915.

McKAY v. McKAY.

(149 Pac. 1032.)

Divorce—Custody of Child—Relative Means of Parents.

1. Where both parents were proper persons for the custody of their child, the fact that the father was better able financially to raise the child than the mother, who was obliged to work to earn a living, was not ground to give him the custody of such child, a daughter, as against the mother, successful in her suit for divorce; since nothing prevented the father from contributing more to the maintenance of the child than the amount directed by the decree, if his means permitted.

[As to liability of father for the support of children after divorce decree awarding custody to another, but not providing for maintenance, see note in *Ann. Cas.* 1913C, 296.]

Divorce—Custody of Child—Modification of Decree.

2. When a change in a decree of the Circuit Court in a divorce suit as to the custody of the child becomes justifiable in the future, the decree may be modified.

From Crook: WILLIAM L. BRADSHAW, Judge.

Department 2. Statement by MR. JUSTICE HARRIS.

Alice McKay and Donald McKay were husband and wife, and Dorothy McKay, aged about 11 years, is

their daughter. The plaintiff commenced a suit for a divorce. A trial resulted in a decree which grants a divorce to plaintiff, awards to her the custody of the child, and requires the father to pay to the clerk of the court the sum of \$20 each month for the care and maintenance of the daughter. Donald McKay appealed.

AFFIRMED.

For appellant there was a brief and an oral argument by *Mr. William H. Wilson*.

For respondent there was a brief and an oral argument by *Mr. M. R. Elliott*.

MR. JUSTICE HARRIS delivered the opinion of the court.

The defendant appealed from the entire decree, but the controversy now chiefly concerns the custody of the child. The appellant says in his printed brief that "if the child were a boy this appeal would not have been taken." Although the oral arguments were directed almost exclusively to a consideration of the welfare of Dorothy McKay, nevertheless the evidence has been examined with care, and the conclusion is that the trial court did not make a mistake in granting the plaintiff a divorce.

Each parent desires the custody of the daughter; and it may fairly be assumed that each would try to raise the child properly. The father resides on a ranch about 3½ miles from school. He raises stock, and of necessity is absent from his home much of the time. At present none but men reside with defendant. He says that if the custody of his daughter is granted to him he would engage the services of some married

woman and her husband, so that Dorothy would have the companionship of a woman.

1. The plaintiff works in a hotel, but she is near a school. The mother is obliged to work and earn a livelihood and it is argued that the father should have the custody of the daughter because he is better able financially to raise the child. No obstacle interposes, however, to prevent the father from contributing more than the decree directs for the maintenance of the child if his means will permit, even though the mother retains the custody of Dorothy.

2. It is not necessary to relate all the evidence. It is enough to say that, except in very rare cases, the instincts of motherhood can be relied upon to give to a daughter of tender years a measure of loving care and attention which no other person can equal. The proper place for this little girl is with her mother. Presumably the trial judge knows the parties, and, in his opinion, the welfare of the daughter demanded that she remain with the mother for the present at least. There is nothing to prevent the Circuit Court from modifying the decree so far as it affects the custody of the child if a change should be justified at any time in the future: *Gibbons v. Gibbons*, 75 Or. 500 (147 Pac. 530).

The decree is affirmed.

AFFIRMED.

MR. CHIEF JUSTICE MOORE, MR. JUSTICE EAKIN and
MR. JUSTICE BEAN CONCUR.

Argued June 25, affirmed July 6, 1915.

SMITH v. NATIONAL SURETY CO.

(149 Pac. 1040.)

Pleading—Complaint—Sufficiency.

1. When not attacked by demurrer or motion as not stating the cause of action, every reasonable intendment will be invoked to sustain the complaint after verdict.

Larceny—Offenses—What Constitutes.

2. Consent of the owner, obtained by fraud, to the taking of his property does not prevent the taking from being larceny.

[As to what constitutes larceny, see notes in 57 Am. Dec. 271; 88 Am. St. Rep. 559.]

Insurance—Theft Insurance—Complaint—Sufficiency.

3. A policy was conditioned for protection against direct loss by burglary, theft or larceny of any property described in the schedule, occasioned by its felonious abstraction from the interior of the premises occupied by the insured. A complaint averred that while the policy was in force there was taken from insured's apartment, without her consent, by one B., who surreptitiously and fraudulently obtained access to the apartment, jewelry of a value greater than \$1,500, none of which had been recovered. It appeared that B. by misrepresentations acquired possession of the property, which he never returned. *Held*, that the complaint was sufficient to state a cause of action, there being under Section 799, L. O. L., a presumption of ownership from insured's possession and the complaint charging larceny, burglary or theft rather than the obtaining of the property under false pretenses.

Evidence—Documentary Evidence—Parol Evidence to Vary.

4. A statement of loss furnished to the insurer may be explained by parol evidence, where it was not one which was necessary to be in writing.

Appeal and Error—Review—Harmless Error.

5. The admission of corroborative evidence which had no substantial influence on the determination was harmless.

Insurance—Theft Insurance—Actions—Evidence.

6. In an action on a theft policy to recover the value of jewels which were obtained from plaintiff by fraud, evidence of her reason for surrendering possession of the jewels was admissible to show that the property was really stolen.

From Multnomah: GUSTAV ANDERSON, Judge.

Department 1. Statement by MR. JUSTICE BENSON.

This is an action by Bessie Smith against the National Surety Company, a corporation, to recover upon what is known as a "burglary" insurance policy. From the record in the case it appears that in January, 1914, the plaintiff, who was living in the Stelwyn Apartments, Portland, Oregon, was the holder of such a policy from the defendant corporation for the protection of certain jewelry and precious stones. A man by the name of Boaz, an ex-convict, having learned that plaintiff's husband was out of town, called upon her at her apartments, and, representing that he was a detective of the city police force, stated that she was wanted as a witness in a criminal charge against a man charged with forging her husband's name to a check for a large sum of money, and demanded that she should give bail for her appearance at the trial. She explained that she did not have the money required for such purpose, and Boaz suggested that she might let him take her jewelry as a pledge for her appearance. She thereupon went into her bedroom and brought out her jewel case, from which he helped himself to a quantity of valuable ornaments of an aggregate value exceeding \$1,500. The valuables were never recovered, and this action followed. By stipulation it was tried by the court without a jury, and judgment was entered in favor of plaintiff, from which this appeal is taken.

AFFIRMED.

For appellant there was a brief over the names of *Messrs. Griffith, Leiter & Allen* and *Mr. T. S. Robinson*, with an oral argument by *Mr. Harrison Allen*.

For respondent there was a brief over the names of *Mr. Charles E. S. Wood, Mr. Prescott W. Cookingham* and *Messrs. Montague & Hunt*, with oral arguments by *Mr. Wood* and *Mr. Cookingham*.

MR. JUSTICE BENSON delivered the opinion of the court.

The principal assignment of error consists in defendant's contention that the complaint does not state facts sufficient to constitute a cause of action, in that it does not allege burglary, theft or larceny, and that there is no allegation of ownership of the property taken. The portion of the complaint which is material in this discussion reads as follows:

"Thereafter, and while said policy of insurance was in full force and effect, to wit, the — day of January, 1914, there was surreptitiously and feloniously taken from the apartment of the plaintiff in the said Stelwyn Apartments, Washington and St. Clair Streets, Portland, Oregon, without the plaintiff's consent, by one George Boaz, who surreptitiously and fraudulently obtained access to said apartment, jewelry and precious stones of a value greater than \$1,500, none of which has been recovered, and plaintiff thereby has suffered, and still suffers, a loss greater than \$1,500."

There was no motion or demurrer attacking this complaint, and defendant, answering, admits its incorporation and the execution of the insurance contract, and denies generally the other allegations.

1-3. There is a marked difference in the exactness required in pleading the elements of crime in an indictment upon the one hand, and stating a cause of action in a civil case upon the other. Again, in determining the sufficiency of a complaint in a civil cause, there is a distinct difference in the conclusions reached upon

demurrer as compared with the consideration of the same pleading after verdict.

“When a complaint has not been attacked by motion or demurrer, and it contains allegations from which a fact necessary to be alleged may be inferred, it will be held good after verdict, although it would have been bad on demurrer, and every reasonable inference or intendment will be invoked to support a complaint after verdict”: *Weishaar v. Pendleton*, 73 Or. 190 (144 Pac. 401), and cases there cited.

This doctrine, of course, is not quoted as in any sense applicable to indictments. The complaint in the case at bar alleges that the chattels were taken from her apartments feloniously and without her consent, and that she has suffered damage thereby in a sum greater than \$1,500. From these allegations it may easily be inferred that the goods were stolen, and that she was the owner of the articles taken, especially since possession raises a presumption of ownership: Section 799, L. O. L. Counsel for appellant contends that the crime committed was neither burglary, larceny nor theft, but rather obtaining personal property by false pretenses. However, the great weight of authority is against this contention, as is said in 25 Cyc. 40:

“If the consent of the owner to the taking is obtained by fraud, it will not prevent the taking from being larceny. If one obtains possession of goods from the owner or possessor by fraud, with intent to steal, the taking is larceny, as is now held in every jurisdiction.”

This doctrine has been sustained by this court in the cases of *State v. Ryan*, 47 Or. 338 (82 Pac. 703, 1 L. R. A. (N. S.) 862); *State v. Meldrum*, 41 Or. 380 (70 Pac. 526). It will be observed that the language of

the complaint, as to form, follows quite closely the phraseology of the insurance policy from which we quote:

“For direct loss by burglary, theft or larceny of any property described in the schedule hereinafter contained and stated to be insured hereunder, occasioned by its felonious abstraction from the interior of the house, building, flat, apartment or rooms actually occupied by the assured.”

We, therefore, conclude that, while the complaint is not artistically framed and would doubtless be vulnerable to demurrer, it contains a defective statement of a good cause of action, and, after verdict, is sufficient.

4. The next assignment of error relates to the admission of the parol testimony of plaintiff in explanation of certain alleged errors in her written statement of the loss to the agent of defendant. This statement was simply evidence of a sort which is not necessarily in writing, and is subject to correction or explanation as any other testimony, and the trial court properly admitted it.

5. As regards the testimony of witness Garrison, while it was possibly hearsay and therefore inadmissible, nevertheless it was simply corroborative of uncontradicted testimony, having no substantial influence upon the determination of the cause, and was therefore harmless.

6. Defendant also contends that the court erred in permitting the plaintiff to answer the following question:

“I will ask you to state now, in going and getting this jewelry after protesting that you did not see why you should, whether you acted willingly, or what was the influencing motive that induced you to get the jewelry.”

We think that it was competent for the plaintiff to testify as to the intent or motive which prompted her to get out her property in response to the demand of Boaz: 16 Cyc. 1187, and cases there cited.

There being no substantial error disclosed in the record, it follows that the judgment of the trial court must be affirmed, and it is so ordered. **AFFIRMED.**

MR. CHIEF JUSTICE MOORE, MR. JUSTICE McBRIDE and MR. JUSTICE BURNETT concur.

Argued June 25, reversed July 6, 1915.

MARKS v. COLUMBIA COUNTY LUMBER CO.

(149 Pac. 1041.)

Animals—Injury by Vicious Horse—Evidence—Subsequent Acts Showing Disposition.

1. In an action by a servant for injuries alleged to result from the viciousness of a horse given him to drive, evidence of conduct of the horse subsequent to the accident was admissible to show its disposition.

[As to liability for injuries by and to animals, see notes in 16 Am. St. Rep. 631; 36 Am. St. Rep. 831.]

Evidence—Opinion Evidence—Acts and Issues.

2. In an action by a servant for injuries from the alleged viciousness of a horse given him to drive, opinion evidence that the horse was not a safe one for the work was wrongfully admitted; that being a question for the jury.

Evidence—Opinion Evidence—Disposition of Animal.

3. The habits, characteristics and disposition of the horse are matters of such common knowledge that it would not require expert testimony to determine whether a horse was safe for certain work.

[Admissibility of evidence of peaceable disposition of animal in action for injuries caused by it, see note in Ann. Cas. 1914B, 1276.]

Master and Servant—Evidence—Condition Subsequent to Accident.

4. Evidence of condition of places and ways a few days after the accident was admissible in connection with a showing that the situation had remained unchanged.

Evidence—Declarations of Servant—Authority to Bind Master.

5. Merely evidence that declarant was a foreman in charge of laborers engaged in handling lumber and piling it in the yard and dock did not show authority on his part to admit liability of his master; and it was error to admit evidence that, several days after the accident, he stated that it was his fault, in that he did not warn the man.

Master and Servant—Assumption of Risk—Employers' Liability Act.

6. The Employers' Liability Act (Laws 1911, p. 16) abrogates the doctrine of assumption of risk in actions coming within its scope.

Master and Servant—Safe Places and Appliances—Viciousness of Horse.

7. Where an animal is used by an employer to carry on work under his direction, he is bound to use reasonable diligence to provide a safe animal, and is bound by what he knew or with reasonable diligence might have known as to the docility of the animal.

Master and Servant—Personal Injuries—Viciousness of Horse—Question for Jury.

8. Evidence that a horse had been in use about the plant for some time, and that the foreman in charge had ample opportunity to observe his conduct when the plaintiff was hurt as well as on former occasions, was sufficient to carry to the jury the question whether the master knew, or with reasonable diligence should have known, the nature of the horse.

From Columbia: JAMES W. CAMPBELL, Judge.

Department 1. Statement by MR. JUSTICE BURNETT.

This is an action by J. F. Marks against the Columbia County Lumber Company, a corporation.

The substance of the complaint is that the plaintiff was engaged in the employ of the defendant as a common laborer handling lumber about its sawmill in Columbia County; that on January 12, 1914, by direction of the foreman of the lumber-yard, to whose orders the plaintiff was subject, the latter was sent to drive a horse owned by the defendant and used to haul trucks loaded with lumber to be piled on and about a dock upon the Columbia River for shipment. The

plaintiff alleges that the horse furnished was dangerous, unruly and wholly unsuited for the work; that the trucks had but two wheels, which were in the center thereof, and were also dangerous and difficult to handle; that he was inexperienced in that kind of work; that the passageways through which he was required to haul the trucks were narrow and piled high with lumber on each side, making it difficult to drive through them with the trucks in safety, or without collision or accident. The plaintiff avers that the defendant knew, or might with reasonable diligence have known, about the disposition of the horse, the danger and unsuitableness of the trucks, and the alleys in which they were required to be operated. The particular grievance of which complaint is made is that, while plaintiff was driving through one of the narrow passages with the horse hitched to a truck-load of lumber, the animal became unmanageable and got beyond the control of the plaintiff, so that the load caught the plaintiff with great violence and jammed his shoulder against the adjacent lumber, whereby his collar-bone was dislocated from his shoulder blade, and he was otherwise hurt, to his great damage. The defendant denies the complaint in important particulars, notably with reference to the vicious nature of the horse, the unsuitableness of the trucks, and the inconvenience of the alleys. The defendant also alleges that the plaintiff knew all about the situation and assumed the risks of the work mentioned; that the horse was tractable and well suited for the purpose; and that the injury sustained by the plaintiff was due to his own negligence. The answer was traversed by the reply in all material particulars. A jury trial resulted in a judg-

ment for the plaintiff, from which the defendant appeals.

REVERSED AND REMANDED.

For appellant there was a brief over the names of *Messrs. Crawford & Eakin* and *Mr. George McBride*, with an oral argument by *Mr. Thomas H. Crawford*.

For respondent there was a brief over the names of *Mr. Glen R. Metsker* and *Mr. Edmund B. Tongue*, with an oral argument by *Mr. Tongue*.

MR. JUSTICE BURNETT delivered the opinion of the court.

1. The first assignment of error is to the effect that the court erred in permitting several witnesses to testify about the acts and conduct of the horse in question after the accident happened. In treating of this subject, the rule is thus stated in *Kennon v. Gilmer*, 131 U. S. 22, 25 (33 L. Ed. 110, 9 Sup. Ct. Rep. 696, 697):

“But evidence of subsequent misbehavior of the horse might properly be admitted, in connection with evidence of his misbehavior at and before the time of the accident, as tending to prove a vicious disposition and fixed habit, and to support the plaintiff’s allegation that the horse was not safe and well broken. The length of time afterward to which such evidence may extend is largely within the discretion of the judge presiding at the trial.”

There is ample testimony in the record on the subject of the misbehavior of the horse at the time of the accident. There is other evidence tending to show that on previous occasions he was hard-mouthed, high-spirited, difficult to control, and that he moved suddenly or stopped suddenly apparently as the whim

suited him. The defendant argues that it is a well-known fact that a horse having run away once will ever afterward do the like if he has the opportunity, although previously he had been well broken and not addicted to that habit. This objection goes merely to the weight of the testimony, for, on the other hand, a horse having vicious habits, like a person, will manifest them repeatedly, and it would be competent to prove this general disposition by the conduct of the horse both before and after the occurrence in question.

2, 3. The next assignment is that the court erred in permitting different witnesses to testify that in their opinion the horse in question was not a safe one for the work. The object of opinion or expert testimony is to enlighten the minds of jurors on questions of fact involving special skill and knowledge as to matters not within the comprehension of ordinary jurors; but it can never be left to an expert to give his opinion on the ultimate question to be determined. In this instance, whether or not the horse was a safe instrumentality with which to perform the labor required of the plaintiff was for the determination of the jury and not for the decision of any expert. Moreover, the habits, characteristics and disposition of the well-known domestic animal, the horse, is a matter of such common knowledge that it would not require the testimony of an expert to determine whether he was safe or not, even if that were a permissible field of expert inquiry.

4. Another assignment of error is to the effect that the court was mistaken in allowing witnesses to testify about the condition of the millyard, docks and passageways a few days after the accident. Abstractly considered, this might be error, but, taken in connection

with the declarations of other witnesses tending to show that the situation in that respect was the same as when the accident happened, we think the testimony complained of was admissible.

5. Another objection to the court's rulings is, in substance, that, over the objection of the defendant, the court permitted hearsay evidence to be given of the statement made by the foreman of the yard concerning the casualty several days after it happened. The testimony in question was that of a witness who spoke of an occurrence which took place about a week after the accident to the plaintiff, and related a conversation with the yard foreman to this effect: The foreman directed the witness to drive the horse, and, as the witness states, said:

"Another thing, I want to warn you. We had a man get hurt here a day or two ago, and you want to watch this horse. Be good to him, as you can. I guess it was my fault. I didn't warn the man."

All the evidence shows about the relation existing between the foreman and the defendant is that the former was in charge of the laborers engaged in handling the lumber and piling it in the yard and dock. There is no testimony whatever in the record indicating that he had any authority to admit the liability of the defendant after the injury to the plaintiff, or to make any statement concerning a past transaction in any way binding the company. The rule against such evidence has been settled in this state by the cases of *Alden v. Grande Ronde Lbr. Co.*, 46 Or. 593 (81 Pac. 385); *Wade v. Amalgamated Sugar Co.*, 65 Or. 488 (132 Pac. 710); *Parker v. Smith Lumber Co.*, 70 Or. 41 (138 Pac. 1061).

A similar error is assigned respecting the statements of physicians whom plaintiff consulted in regard to the nature of his injuries. The record, however, shows that in some instances the testimony about the declarations of the medical men was excluded on the objection of the defendant; and in the remaining instances on that point it went in without opposition. While it may be said that narrations to the jury of what the physicians said were purely hearsay, the bill of exceptions does not present a situation in which we can exclude them.

6. It is also argued that the testimony was clear to the effect that the plaintiff knew, or by the exercise of reasonable diligence should have known, all the hazards and dangers attendant upon the employment in which he was engaged at the time he was hurt, and that consequently he assumed the risk. The complaint, however, in our judgment, states a cause of action, within the scope and meaning of what is known as the Employers' Liability Act, in that it says the "performance of the work or services was dangerous and likely to result in injury to the plaintiff." That statute requires that:

"Generally, all owners, contractors, or subcontractors, and other persons having charge of, or responsible for, any work involving a risk or danger to the employees or the public, shall use every device, care and precaution which it is practicable to use for the protection and safety of life and limb, limited only by the necessity for preserving the efficiency of the structure, machine, or other apparatus or device, and without regard to the additional cost of suitable material or safety appliance and devices."

We have frequently held that, because this is a criminal statute visiting a penalty upon owners and

others for a violation of its provisions, the doctrine of assumption of risk by the employee is abrogated in actions coming within its scope, for the reason that it will not be presumed that one party to the contract will be bound by the action or nonaction of the other involving a violation of public law by the latter: *Hill v. Saugested*, 53 Or. 178 (98 Pac. 524, 22 L. R. A. (N. S.) 634, note); *Love v. Chambers Lbr. Co.*, 64 Or. 129 (129 Pac. 492); *Dorn v. Clarke-Woodward Drug Co.*, 65 Or. 516 (133 Pac. 351); *Dunn v. Orchard Land Co.*, 68 Or. 97 (136 Pac. 872); *Schaller v. Pacific Brick Co.*, 70 Or. 557 (139 Pac. 913); *Heiser v. Shasta Water Co.*, 71 Or. 566 (143 Pac. 917).

7, 8. It is further argued as a ground for reversing the judgment of the court on the motion for a nonsuit that "the owner of a domestic animal is not liable for injuries inflicted by such animal, unless such owner had knowledge of the vicious disposition or bad character of such animal." As we understand the authorities, the rule is that where an animal is used by an employer as a means for carrying on a work under the directions of the employer, the latter is bound to use reasonable diligence to provide a safe animal, the same as any other instrumentality for performing the labor, and that, as to the docility of the animal, the employer is bound by what he actually knew or with reasonable diligence might have known. The doctrine is exemplified in the case of *Arkansas Smokeless Coal Co. v. Pippins*, 92 Ark. 138 (122 S. W. 113, 19 Ann. Cas. 861, and note). In the instant case there was testimony to the effect that the horse had been in use about the plant of the defendant for some time, and that the foreman in charge of the work had ample opportunity to observe his conduct, not only when the plaintiff was

hurt, but on former occasions. This was sufficient to carry the case to the jury on the question of whether the defendant knew, or with reasonable diligence ought to have known, the true nature of the animal in question.

For the errors assigned, where the court allowed the declarations of the foreman concerning past transactions to go to the jury as binding the company, and for permitting so-called experts to give their opinion about whether the horse was safe for the purpose or not, the judgment must be reversed and the cause remanded to the Circuit Court for further proceedings.

REVERSED AND REMANDED.

MR. CHIEF JUSTICE MOORE, MR. JUSTICE BEAN and MR. JUSTICE BENSON concur.

Argued June 23, affirmed July 6, 1915.

BARTON v. SCHOOL DISTRICT NO. 2.

(150 Pac. 251.)

Schools and School Districts—Contract of Hiring—Validity.

1. Under Laws of 1913, pages 301, 304, Sections 7, 17, providing that the school board may hire teachers, and that any duty imposed on the board as a body must be performed at a regular or special meeting, and that the consent to any particular measure obtained of individual members when not in session is not an act of the board, a contract of hiring is not made out where the minutes show that the board at a meeting made a selection of plaintiff as a teacher, but the contract was prepared by the clerk and signed by the members individually after adjournment.

[As to right of school teacher to compensation as dependent on validity of contract or appointment, see note in *Ann. Cas.* 1913C, 372.]

Corporations—Powers—Mode of Exercising.

2. Where power is given a corporation to do an act, and the particular method of its exercise pointed out, the mode is the measure of the power.

FROM Klamath: HENRY L. BENSON, Judge.

Department 1. Statement by MR. JUSTICE McBRIDE.

This is an action by T. A. Barton against School District No. 2 in Klamath County, to recover for an alleged breach of contract of hiring. The facts are as follows: At an adjourned meeting of the directors of School District No. 2, which met for the purpose of selecting teachers for the ensuing school year, the minutes kept by the clerk show that the following proceedings were had:

“Bonanza, Oregon, June 28, 1913.

“The board of directors of School District No. 2, Klamath County, met in the school building in said district to-day. All directors were present: J. M. Bertholf in the chair; D. G. Horn, secretary of the meeting. The matter of district clerk's bond was taken up and bond was presented in the sum of one thousand dollars, signed by D. G. Horn, principal, John S. Horn and Jacob Rueck, as sureties; and it appearing to be sufficient the board accepted the same. It was decided that school begin on Monday, September 1, 1913, and that the length of the term be nine months. The matter of hiring teachers, coming up for consideration, resulted in the selection of the following teachers: Primary grade, Miss Grace Lytle; intermediate, Miss Irma Taylor, with second choice, Mildred Ober; seventh and eighth grades, Miss Gertrude Stewart; principal, T. A. Barton—and Director L. D. Burk voting ‘No,’ upon the selection of T. A. Barton as principal. Upon motion duly made and put the meeting adjourned.

“D. G. HORN,

“Secretary.

“J. M. BERTHOLF,

“Chairman of the Meeting.”

It appeared from the testimony that the clerk was directed to prepare contracts. No blank forms being

available, they were not filled out or signed by the directors while the board was in session, but were prepared several days afterward; and the one relating to the hiring of plaintiff was signed in triplicate by two of the directors, each signing at a different time and place. The copies of the contract were then forwarded to plaintiff at Eugene, Oregon, and were by him signed, after which one was returned to the clerk of the district and by him filed, another sent to the county superintendent, and the third retained by plaintiff. Subsequently, and shortly before the time for the fall term of school to begin, a change having taken place in the personnel of the directorate, the new board, on August 19, 1913, made an order canceling the contract of the plaintiff "for the reason that said contract was not legally entered into at a legally called meeting, and was not legally executed, and was not the action of the board, but the action of individuals," of which resolution plaintiff was duly notified by the clerk. Upon the day fixed for the beginning of the fall term, plaintiff appeared at the school and offered to teach, but his services were refused; another teacher having been employed. Whereupon he brought this action for breach of contract. Upon the trial plaintiff offered to show by oral testimony that, at the meeting of the board at which he was selected as a teacher, an oral resolution was passed fixing his compensation at \$100 per month, but that the clerk omitted to enter it of record. This testimony was rejected by the court, and an exception allowed. At the conclusion of plaintiff's evidence the court, upon motion of defendant, ordered a nonsuit, and from that judgment plaintiff appeals.

AFFIRMED.

For appellant there was a brief over the name of *Messrs. Oneill & Manning*, with an oral argument by *Mr. H. M. Manning*.

For respondent there was a brief over the name of *Messrs. Kuykendall & Ferguson*, with an oral argument by *Mr. Delmon V. Kuykendall*.

MR. JUSTICE McBRIDE delivered the opinion of the court.

1. This appeal presents two questions. The first relates to the manner in which the alleged contract was executed, and the second to the ruling of the court excluding parol testimony as to matters occurring when plaintiff was selected as a teacher. The following sections of Chapter 172, Laws of 1913, control the subject now to be discussed:

“The board at a general or special meeting called for that purpose, shall hire teachers, and shall make contracts with such teachers which shall specify the wages, number of months to be taught, and time employment is to begin, as agreed upon by the parties, and shall file such contracts in the office of the district clerk. No contract shall be made with any teacher who is related by blood or marriage within the third degree to any member of the school board without the concurrence of all the members of the board, by a vote duly entered on the clerk’s records of proceedings. Unless otherwise provided in the teachers’ contract, it shall be understood that the branches provided for in the state course for the first eight grades shall be taught excepting school law and theory and practice of teaching. * * Any duty imposed upon the board as a body must be performed at a regular or special meeting, and must be made a matter of record. The consent to any particular measure obtained of individual members when not in session is

not an act of the board, and is not binding upon the district. If a contract is made without authority of the board, the individual making such contract shall be personally liable."

We think a fair construction of these two sections indicates that the amount of salary to be paid shall be fixed by resolution, and that the written contract, when prepared, shall be considered and executed by the directors at a meeting of the board. The district is entitled to have the judgment of the board, as such, not only upon the fitness of the persons selected, but upon the form, substance and sufficiency of the contract which constitutes the final act of hiring and makes the transaction complete. The teacher is not hired when he is designated by the board as the proper person to be contracted with, nor until a written contract considered by the board and found sufficient is signed and filed with the clerk. The selection is merely preliminary to the final contract. It points out the persons to be contracted with, and nothing more. That such was the actual intention of the directors here is indicated by the fact that in one instance the record shows that a certain person was designated as a teacher, with a second choice, thus: "Intermediate (grade) Miss Irma Taylor, with second choice, Mildred Ober." It is plain that neither of these persons could have claimed that she had been "hired" by reason of this resolution. The selection of all the teachers was tentative and dependent upon their signing and accepting a written contract approved by the board. We think it important that the board, as such, should meet and discuss the form and substance of a contract before signing it, and that a signing by indi-

vidual directors at different times and places is insufficient to bind the district.

2. It is a principle settled by numerous decisions that where a power is given to a corporation to do an act, and the particular method by which that power is to be exercised is pointed out by statute, the mode is the measure of the power. Here the power or duty to employ teachers is prescribed, and the particular method by which that power shall be executed is also pointed out, and not only is this the case, but the statute adds the mandatory words:

“Any duty imposed upon the board as a body must be performed at a regular or special meeting, and must be made a matter of record.”

It was the duty of the board to hire the teachers and to enter into and sign contracts. This duty they attempted to perform and finish outside of a regular or special meeting, and their action was void and amounted only to a personal contract of the directors signing. As tending to support plaintiff's contention, his counsel cite *School District v. Allen*, 83 Ark. 491 (104 S. W. 172); *Faulk v. McCartney*, 42 Kan. 695 (22 Pac. 712); *Brown v. School District*, 1 Kan. App. 530 (40 Pac. 826); *Holloway v. Ogden School District*, 62 Mich. 153 (28 N. W. 764); *Dolan v. Joint School District*, 80 Wis. 155 (49 N. W. 960); *Splaine v. School District*, 20 Wash. 74 (54 Pac. 766). But an examination of these cases shows that they were rendered either under statutes widely different from ours, or that the services of the teacher had been actually accepted and rendered, in which case the irregularities had been waived. So here, if the plaintiff had been permitted, without objection, to enter upon the performance of his duties, the district could not escape

paying him for his services upon that pretext: *Stout v. Yamhill County*, 31 Or. 314 (51 Pac. 442), approved in *Baker County v. Huntington*, 46 Or. 275, 280 (79 Pac. 187), seems to support plaintiff's contention that, in cases of this character, oral evidence is admissible to supply an omission in the records of the board; but, in view of the fact that there was no valid execution of the contract of hiring, this question becomes immaterial.

The judgment is affirmed.

AFFIRMED.

MR. CHIEF JUSTICE MOORE, MR. JUSTICE BURNETT and
MR. JUSTICE HARRIS concur.

Argued June 24, affirmed July 6, 1915.

FRANCISCOVICH v. WALTON.

(150 Pac. 261.)

Evidence—Judicial Notice—Facts of Common Knowledge.

1. The court will take judicial notice of the fact that Bulgaria is an independent kingdom, and that a subject thereof is not a national of Russia.

Treaties—Grounds of Obligation.

2. The fact that, as a matter of comity, Russian consular officers look after the welfare of Bulgarian subjects in the United States does not give Bulgaria any treaty rights enjoyed by Russia, Bulgaria having no treaty with the United States or consular representative.

Executors and Administrators—Appointment—Irregularity—Right to Object.

3. The appointment of a stranger as administrator of a decedent, leaving a wife and heirs at law in a foreign country, made within 30 days after decedent's death and within the time which the widow, heirs at law and creditors have a prior right to apply for appointment, is technically irregular, and will be revoked on application of any of those having a prior right, but another stranger may not maintain a petition to revoke the appointment and obtain his own appointment.

[As to grounds for removal of administrators, see note in 138 *Am. St. Rep.* 525.]

Death—Executors and Administrators—Actions—Employers' Liability Act—Persons Entitled to Sue.

4. An administrator may not settle a claim under the Employers' Liability Act (Laws 1911, p. 16) for the death of his intestate, or sue therefor, but that right is vested by law in the surviving widow of decedent.

From Clatsop: JAMES A. EAKIN, Judge.

Department 1. Statement by MR. JUSTICE McBRIDE.

This is a proceeding to review the action of the County Court of Clatsop County in removing plaintiff as administrator of the estate of Dan Valchanoff, deceased, and appointing defendant, James Walton, Jr., in his place. The record discloses that on May 16, 1914, Dan Valchanoff was killed in an accident; that on the 20th day of the same month plaintiff filed a petition in regular form setting forth the fact of the death of the deceased, that his wife and heirs resided at Kirilovo, in the kingdom of Bulgaria, and that petitioner was a friend of deceased, who it was alleged had wages due him in Clatsop County to the amount of \$40, money loaned out in said county in the sum of \$105, and a claim for personal injuries of about \$1,500. He was thereupon appointed administrator of the estate, and gave bond and qualified as such. Thereafter, on the 28th of May, 1914, defendant in this suit filed a petition, the material portion of which is as follows:

“The petition of James Walton, Jr., respectfully shows: That he is a resident and inhabitant of Multnomah County, Oregon, and the specifically designated attorney and representative of Hon. Ambrose Gherini, Russian vice-consul of the imperial Russian consulate, of San Francisco, California, which consulate has jurisdiction of the state of Oregon in consular matters. That the aforesaid Russian consulate has under its jurisdiction nationals, not only Russian, but also Bulgarian, Roumanian, Montenegrin and Servian. That

Dan Valchanoff died in Clatsop County, Oregon, on or about the 14th day of May, 1914, and at the time of his death was a resident and inhabitant of said Clatsop County, and that he left an estate in said Clatsop County consisting of personal property, the exact value of which your petitioner is not at this time able to give, but upon information and belief reports that the same consists of wages due and accounts receivable in the amount of \$145, and an unliquidated claim for his wrongful killing, the value of which is indefinite and uncertain. That as far as your petitioner has been able to learn the heirs of the deceased consist of a father, a mother, and a wife, residing at Kirilovo, Bulgaria, which fact has been by your petitioner communicated to the Russian consulate, that the said heirs may receive knowledge and information of the demise of the deceased in conformance with the spirit and intent of the treaty existing between the United States of America and the empire of Russia. That the *modus vivendi* between the United States of America and the empire of Russia is based upon the most favored nation clause treatment, and, by virtue of the aforesaid, the empire of Russia relies upon the consular convention of 1911 between the United States and Sweden, to wit, and especially article XIV thereof, under and by virtue of which the consul-general, consul, vice-consul general, or vice-consul, or, in his absence, the representatives of the aforesaid, shall have the right to be appointed as administrator in the case of the death of any citizen of Sweden in the United States not having in the country of his decease any known heirs or testamentary executors by him appointed, etc. That said article XIV also provides *inter alia* that the competent local authorities shall at once inform the nearest consular office of the nation to which the deceased belongs of the circumstances, in order that the necessary information may be immediately forwarded to the parties interested. That under and by virtue of the aforesaid *modus vivendi* of the favored nation clause and the aforesaid consu-

lar convention the aforesaid officials of the Russian consulate, or in their absence their representative, has the exclusive right to be appointed administrator of the aforesaid estate of Dan Valchanoff, for the reason that he died in the United States of America leaving no heirs or executors by him appointed in this the said United States of America. That heretofore and previous to the expiration of 30 days from the time of the death of the deceased one Franciscovich, petitioning as a friend of the deceased, has been appointed by this court as administrator of this estate, to which appointment your petitioner specifically and generally objects, for the reason that your petitioner, as the representative of the Russian vice-consul, has a prior and the exclusive right to receive letters of administration by reason of the facts aforesaid. That the Russian consulate is better qualified to care for the interests of its deceased nationals, and that, therefore, in addition to the legal authority which the consular office has to name the administrator, it is just, proper, equitable, and reasonable that the said consulate should supervise the administration of the estate of the aforesaid deceased. Wherefore your petitioner prays that letters of administration heretofore granted to the aforesaid Martin Franciscovich may be revoked, annulled, and set aside; and your petitioner further shows that he is a fit, competent and proper person to receive letters of administration in the aforesaid estate, and therefore prays that letters of administration may be issued to him upon his subscribing to the oath of office as required by law and filing a good and sufficient bond in the sum of \$—, which bond shall be subject to the approval of this court."

Thereupon after hearing argument of counsel, the County Court removed plaintiff and appointed defendant as administrator, giving as a reason therefor:

"That the deceased Valchanoff is a national of the imperial Russian empire, and that under the treaty existing between the United States of America and the

aforesaid imperial Russian empire the consular officers of the latter nation are entitled to preference in the matter of naming the administrator."

The plaintiff thereafter sued out a writ of review to the Circuit Court, where the order of the County Court was reversed, from which ruling defendant appeals.

AFFIRMED.

For appellant there was a brief over the names of *Mr. James Walton*, *Mr. George R. Alexander* and *Mr. Ambrose Gherini*, with an oral argument by *Mr. Walton*.

For respondent there was a brief over the names of *Mr. George C. Fulton* and *Mr. Clarence J. Curtis*, with an oral argument by *Mr. Fulton*.

MR. JUSTICE McBRIDE delivered the opinion of the court.

1, 2. The petition of defendant for letters of administration makes no charge of maladministration against plaintiff, but is based upon the assumption that petitioner, as a representative of the Russian vice-consul, had a prior and exclusive right to receive letters of administration upon the estate of deceased. The County Court, proceeding upon the same theory, removed plaintiff and appointed defendant. Since the abrogation of the treaty with Russia in 1911, we are unaware of any arrangement with that power whereby its subjects or consuls are entitled to invoke the most-favored nation clause in their intercourse with the United States. The theory of defendant, originally, seems to have been that a Bulgarian subject is a national of Russia; that Russia has a right under the

most-favored nation clause of its treaty or convention with the United States to avail itself of the treaty between the United States and Sweden (37 Stat. 1479), which gave to consular officers of that kingdom a prior right in certain instances to have themselves, or their representatives, appointed administrators of their deceased nationals sojourning in the United States. We take judicial notice of the fact that Bulgaria is an independent kingdom, and that a subject thereof is not a national of Russia. Therefore, while it may be true that, as a matter of comity, Russian consular officers have looked after the welfare of Bulgarian subjects in this country, Bulgaria not having any treaty with or consular representative here, this fact does not give Bulgaria any treaty or convention rights which are enjoyed by Russia. In fact, any right in that behalf was expressly waived by counsel upon the argument here, so that the case stands upon the same footing as though defendant had made the application upon his own initiative.

3. The appointment of plaintiff was technically irregular, because made within 30 days after the death of deceased, within which time the widow, heirs at law, and creditors of the estate had a prior right to apply. Had any qualified member of any of these classes applied it would have been the duty of the court to revoke the appointment of plaintiff and appoint the party so applying; but defendant did not show any right or qualification superior to plaintiff, and it was an abuse of the court's discretion to revoke one irregular appointment in order to make another equally irregular. As remarked by Justice BEAN, in *Cusick v. Hammer*, 25 Or. 473 (36 Pac. 525):

“When the regularity of an appointment already made is attacked, and sought to be revoked because issued to the wrong member of a class entitled to administer, the petitioner must affirmatively show in an issuable form facts which, if true, give him the preference under the law.”

The defendant's petition disclosed the fact that he had no legal standing to contest plaintiff's appointment.

4. While outside of the case, though suggested on the argument, it may not be improper to say that it appears that the chief asset of the estate is an unliquidated claim for damages arising out of the death of deceased, as a result of personal injuries. If these injuries arose under circumstances cognizable under the provisions of the Employers' Liability Act, the administrator would have no right to settle the claim or even to bring an action upon it; that right being vested by law in the widow.

The judgment of the Circuit Court is affirmed.

AFFIRMED.

MR. CHIEF JUSTICE MOORE, MR. JUSTICE BURNETT and MR. JUSTICE BENSON concur.

Argued May 25, reversed June 8, rehearing denied July 13, 1915.

NEER v. SALEM.

(149 Pac. 476.)

Municipal Corporations—Public Improvements—Assessment of Benefits—Refund—Parties Entitled.

1. Plaintiff sold land to S., agreeing that if a sewer assessment should be declared valid he would pay it. The assessment was paid by plaintiff. The assessment on another sewer district having been declared invalid, throwing the cost on the whole city, and thus imposing an unjust burden on the property in plaintiff's district, a charter provision was adopted authorizing the city to pay the assessment

on both districts and to refund any special assessment paid, and providing for repayment to all property owners who had theretofore paid such sums as might have been paid on account of such special assessments levied against property to which such persons held the record legal title on a specified date subsequent to plaintiff's conveyance. An ordinance was also adopted providing for the repayment to all property owners who had paid by themselves or their grantors any special assessment. The city refunded to S. the amount paid by plaintiff. *Held*, that plaintiff was not entitled to a refund of the amount paid by him, as the charter and ordinance confined the right to refund to those holding the title on the date specified, and, in view of the fact that S.'s property would be burdened with the increased general taxation, this plan of refunding did not seem to be inequitable, and certainly was not so inequitable as to render it obnoxious to law.

Municipal Corporations—Public Improvements—Assessment of Benefits—Refund—Parties Entitled.

2. The changed method of paying for the sewer did not in itself, irrespective of the ordinance, entitle plaintiff to recover back the amount paid by him.

[As to meaning of "local improvement" for which special assessment may be levied, see note in *Ann. Cas.* 1914B, 542.]

From Marion: PERCY B. KELLY, Judge.

In Banc. Statement by MR. JUSTICE MCBRIDE.

This is an action by James R. Neer against the City of Salem to recover the sum of \$318.97, paid by plaintiff as a sewer assessment upon his property in Salem. The facts are as follows: In 1911, a sewer assessment was duly levied upon certain lots of plaintiff in North Salem. The general area of the proposed improvement included a large part of what is known as North Salem. The validity of the assessment was contested by plaintiff and a large number of other citizens, but was finally declared valid by this court. Before this decision was rendered and on July 5, 1911, plaintiff sold his property to Hattie P. Stith for the sum of \$3,500, giving a warranty deed therefor and agreeing with her that if the assessment should be declared valid he would pay it so as to give her a clear title. On April 5, 1912, and after the assessment had been declared valid, plaintiff paid the assessment and took

a receipt therefor. Subsequently, a large sewer assessment for the South Salem sewer district having been declared invalid after the improvement had been completed, the cost of the latter improvement, amounting to about \$180,000, was thrown upon the taxpayers of the whole city, whereby the property holders of the North Salem district were placed in a situation where they not only had to bear the whole expense of constructing their own sewers, but also of contributing ratably to the construction of the sewer system of South Salem. To remedy this manifest injustice, the city passed by the initiative a charter providing for the issuance and sale of bonds to pay for both improvements and for refunding sums already paid on either. That portion of the charter bearing upon this subject is as follows:

“The City of Salem shall have full power and authority to issue and sell its general obligation bonds for meeting the cost and expense incident to the laying down and constructing of any and all public sewers and drains heretofore laid or constructed within or without the corporate limits of the city, and for the purpose of paying and redeeming any and all bonds, warrants, or other evidences of indebtedness heretofore issued by the city in the construction of any and all public sewers or drains heretofore laid, built, or constructed and for the payment or refund of any and all public sewer or drainage bonds or warrants now outstanding against said city, and for the payment and refunding of any special assessment levied and paid by any person, firm, association, or corporation on account of the laying and construction of any such public sewers or drains. * * The common council shall repay out of the funds derived from the sale of said bonds to all property owners who have heretofore paid into the city treasury by themselves or their grantors, such sum or sums as may have been from time to time

paid by themselves or their grantors, together with interest, thereon at 6 per cent per annum from the date of payment as entered in the docket of city liens to the date of sale of said bonds, on account of the special assessments levied against any property to which said person held the record legal title on December 2, 1912, the date of the adoption of Section 52 under the initiative laws. The remainder of such funds shall be applied to the payment and redemption of any bonds, warrants, notes, or other evidences of indebtedness outstanding against the City of Salem on account of the construction of any of the sewers and drains mentioned in subdivision or paragraph c of this section."

There was also passed at the same time an ordinance, Section 4 of which is as follows:

"Out of the moneys derived from the sale of said bonds, there shall be repaid to all property owners entitled thereto, who have heretofore paid into the city treasury, by themselves or their grantors, such sum or sums as may have been from time to time paid by them or their grantors on account of special assessments levied for the construction of any of said sewers or drains, together with interest thereon, at six (6) per centum per annum from the date of payment as entered in the docket of city liens to the date of sale of the bonds provided for under Section 52 of the charter, as amended at this election, and this ordinance."

On December 30, 1913, Hattie P. Stith, the grantee of plaintiff, applied to have the amount paid by plaintiff refunded to her. Her application complied technically with every requirement of the charter and ordinance, and the money was paid to her. Plaintiff, claiming that he was the person entitled to the refund, brought this action against the city, and upon trial in the court below received judgment, from which defendant appeals.

REVERSED.

For appellant there was a brief over the names of *Mr. William H. Trindle*, City Attorney, *Mr. Harold D. Roberts* and *Mr. Rollin K. Page*, with oral arguments by *Mr. Trindle* and *Mr. Roberts*.

For respondent there was a brief over the name of *Messrs. McNary, Smith & Shields*, with an oral argument by *Mr. Roy F. Shields*.

MR. JUSTICE McBRIDE delivered the opinion of the court.

1. The refunding provisions of the charter and ordinance do not include plaintiff. They expressly confine the right to receive the refund to persons holding "the record legal title on December 2, 1912," at which date, and for a long time previous thereto, the record legal title was in plaintiff's grantee, *Hattie P. Stith*. With the equity of this plan of refunding we have nothing to do, although as a general rule it would seem to be as fair as any that could be devised. The sewer assessments were not a personal charge against the property owners, but against the lots affected by it when the change was made, so that instead of each lot being liable for its proportionate share of the \$180,000, or thereabouts, which was the cost of the improvement, each lot was subjected to its proportionate share of taxation to pay the interest and finally the principal of the \$480,000 bond issue provided to pay for all street improvements in the city. We have no means of determining whether or not the property is less burdened by the latter method than the former, as that involves speculation as to the amount of taxable property in the city other than land, the future growth of the municipality, and other factors in the problem not

before us. The idea of the framers of the charter probably was that, as the land would doubtless have to bear a great portion of the burden of taxation under the bonding scheme, it would be more equitable to return the amounts already paid in to the then owners of the land, than to others who had disposed of their landed interests. That the plan will work out exact justice in every instance is not to be expected, but that it will as nearly approximate justice as any other that could have been devised is very probable.

Let us adopt plaintiff's view and apply it to Mrs. Stith's situation. She bought this property with an assessment upon it, the validity of which was in controversy. Plaintiff was so confident the assessment would be declared invalid that he was willing to take \$3,600 and assume the risk of paying it. He got his price, lost the suit, and paid the assessment. Now, if the money so paid is refunded to him, Mrs. Stith's property must respond in increased general taxation every year until the bonds which take the place of the original assessment, together with their annual interest, are discharged. It will therefore be seen that there is nothing so inequitable about the method devised by the city as to render it obnoxious to law. Authorities have been cited to the effect that a right to a refund does not run with the land and will not pass with a conveyance thereof. *Borton v. City of Portland*, 62 Or. 544 (125 Pac. 847), *Smith v. City of Minneapolis*, 95 Minn. 431 (104 N. W. 227), and *Bernays v. Wurmb*, 4 Mo. App. 231, are cases relied upon; but an examination shows that the holding was made by reason of the wording of the ordinances under which the cases arose. Thus in *Borton v. City of Portland* the ordinance provided for a refund to "persons

who have paid the assessments." In *Smith v. City of Minneapolis* the city ordered an improvement and collected from plaintiff's grantor an assessment against his lot to pay for it. Subsequent to the purchase by Smith of the lot so assessed, the improvement was abandoned and the amount of the assessment refunded to plaintiff's grantor. Whereupon Smith sued the city to recover the amount of the assessment. It was held that as he had not paid the money, and no improvement had been made, he was not entitled to recover, and that the right to recover the refund did not run with the land. In *Bernays v. Wurmb* the refund was authorized to be paid to "the persons who had paid the taxes," and it was held that a grantee who purchased subsequent to the payment by his grantor was not entitled to the refund. It will be seen from the foregoing cases that the assertion by the courts that the right to the money refunded does not follow the title, but belongs to the person who paid the taxes, is not a statement of a general principle of law, but is based upon the express or implied terms of the particular statute or ordinance there being considered.

2. Counsel for plaintiff also contend that plaintiff is entitled to recover back the amount of the assessment irrespective of the ordinance, because the method of paying for the improvement has been changed; but no case has been cited, and we believe none exists, where this doctrine has been sanctioned by any court. The cases cited to sustain this contention are: *Riker v. Mayor of Jersey City*, 38 N. J. Law, 225 (20 Am. Rep. 386); *City v. Hill*, 39 N. J. Law, 555; *McConville v. St. Paul*, 75 Minn. 383 (77 N. W. 993, 74 Am. St. Rep. 508, 43 L. R. A. 584); and *San Antonio v. Walker* (Tex. Civ. App.), 56 S. W. 952. The two New Jersey cases

are to the effect that, where assessments have been voluntarily paid upon a levy afterward declared invalid by the courts, the money so paid may be recovered back. The Minnesota case holds:

“Where a municipal corporation has, after the commencement of a street improvement and after the collection of a special assessment therefor, wholly abandoned such improvement, a person, whose property has not been benefited in any manner by the work already done, and who has, by judicial proceedings, been compelled to pay the full amount of his assessment, is entitled to recover from the city the amount paid by him, with interest, as upon a failure of consideration.”

This case appears to state clearly the conditions of a recovery.

The case at bar may be distinguished in this: (1) The assessment here was finally declared legal by the highest tribunal, whereas in the case cited the assessment proceedings were by stipulation of the parties declared null and void. (2) In the case at bar the improvement had been completed and the plaintiff's property had received the benefit of it before he sold to Mrs. Stith, while in the case cited the improvement had not been completed and plaintiff's property had received no benefit; and, benefit to the property being the consideration, such consideration failed.

While there is testimony that nothing was added to the purchase price on account of the assessment, the same witness also testifies that there was an agreement at the time of the purchase that if it was adjudged legal plaintiff should pay it, so that the lien was considered and entered into the contract of purchase; and it would seem highly improbable that Mrs. Stith would have taken the property at the price she paid with a stipula-

tion that she should pay the assessment if it should be adjudged legal. There would be little justice or equity in compelling her to pay it indirectly by increased taxation on her property merely because the city had changed the method of paying for the improvement.

Considering the whole case made by plaintiff, we conclude that he has shown no right to recover either under the charter and ordinance or otherwise; and the judgment is reversed, and the cause remanded, with directions to enter judgment for defendant.

REVERSED. REHEARING DENIED.

MR. CHIEF JUSTICE MOORE and MR. JUSTICE BURNETT took no part in the consideration of this case.

Rehearing granted November 14, 1914, reargued February 15, former opinion sustained July 13, 1915.

(See 72 Or. 330.)

MATLOCK v. MATLOCK.

(150 Pac. 261.)

From Lane: LAWRENCE T. HARRIS, Judge.

For appellant there was a brief over the names of *Mr. J. M. Pipes*, *Mr. Lark Bilyeu* and *Messrs. Woodcock & Smith*, with oral arguments by *Mr. Pipes* and *Mr. Bilyeu*.

For respondent there was a brief over the names of *Mr. W. H. Wilson* and *Messrs. Thompson & Hardy*, with oral arguments by *Mr. Wilson* and *Mr. C. A. Hardy*.

Department 1. Opinion PER CURIAM.

A rehearing of this cause was granted, but upon a reconsideration of the question involved we conclude the former opinion should be adhered to; and it is so ordered.

FORMER OPINION SUSTAINED.

MR. JUSTICE HARRIS took no part in the consideration of this cause.

Argued June 6, affirmed July 13, 1915.

HARVEY v. CORBETT.*

(150 Pac. 263.)

Master and Servant—Safety Devices—Statutory Requirements.

1. Substitutes for safety appliances not within the substantial specification of the Employers' Liability Act (Laws 1911, p. 16) do not take the place of devices specifically named, and devices or things required by a city ordinance will not serve as a substitute for those required by the act.

Master and Servant—Safety Appliances—Statutory Requirements.

2. Where it did not appear that "tie-in" ropes used to keep a staging from swaying could not be so arranged as not to injure the woodwork of the building, the fact that such woodwork is injured does not excuse noncompliance with the statute requiring such "tie-in" ropes.

Master and Servant—Independent Contractors—Who are.

3. Where a contract provided that a construction company should be paid a commission as the owner's agent in constructing a building according to plans and specifications, that the principal should pay for all material, but the agent might contract in the name of the principal for labor and material, such contracts to be submitted to the principal for approval, and that the owners had a right to employ a person to inspect any work or materials in the manner of construction, the construction company employed was not an independent contractor.

[As to duty and liability of person furnishing appliances for use by servant of another for injury to such servant, see note in *Ann. Cas.* 1913C, 754.]

*As to who are independent contractors, see notes in 65 L. R. A. 445; 17 L. R. A. (N. S.) 371. REPORTER

Master and Servant—"Independent Contractors"—Who are.

4. Under Employers' Liability Act (Laws 1911, p. 17), Section 2, providing that the manager, superintendent or foreman, or other person in charge of the construction shall be held to be the agent of the employer in all suits for damages by an employee, where a contract for the construction of a building provided that the work should be overseen by a firm of architects, such architects were not independent contractors.

Master and Servant—Safety Appliances—Statutory Requirements.

5. The Employers' Liability Act provides that, when any staging is used in the construction of a building at a certain height, it must be fastened with lash ropes to keep it from swaying, and the scaffold must also be provided with a guard-rail. While plaintiff was engaged at work upon a scaffold, the supporting ropes slipped, and he fell to the ground and was injured. The lash ropes which had previously been used were ordered taken off by defendant's superintendent. *Held* that, the furnishing of tie ropes being a nondelegable duty, defendants were liable.

Master and Servant—Assumption of Risk—Employers' Liability Act.

6. Assumption of risk constitutes no defense under the Employers' Liability Act.

From Multnomah: HENRY MCGINN, Judge.

Department 2. Statement by MR. JUSTICE EAKIN.

This is an action by J. A. Harvey against Henry Ladd Corbett, Elliott R. Corbett and Hamilton F. Corbett, William B. Patterson, Albert E. Doyle and J. George Beach, partners as Patterson, Doyle & Beach, and John Doe Frenell, to recover damages for personal injuries received on May 18, 1912, while working on the Lipman-Wolfe ten-story building in Portland, Oregon. The Corbetts were the owners of the building, and the Hurley-Mason Company, a corporation, was constructing it. At the time of the accident the skeleton work on the structure had been completed, and the constructors were in the act of washing off the outside and cleaning the premises by "washing down and pointing up," the latter being done by inserting into the seams a soft material sometimes called putty. In placing the terra-cotta and constructing the build-

ing the face of it became tarnished and soiled. The plaintiff had worked thereon for some five months laying terra-cotta, and for two weeks prior to the accident had worked at washing down and pointing up the face of the building. This work was being done on a scaffold about 20 feet long which was hung from the top of the structure and swung by means of a block and tackle fastened at each end. The ends of the ropes used were woven through two holes in the bottom of the staging, which, when near the top of the building, the weight of the long ropes would hold without other fastening. Two men, the plaintiff and a fellow-workman, got on the staging after it was put in place and began to perform the work stated as the scaffold was lowered. In doing this the employees had a trowel, two buckets of water, two of acid, and one of putty on the scaffolding, each holding about five gallons. The plaintiff was an experienced bricklayer, and had done this kind of work for some fifteen years. He and his coworker had started from the top of the building, and on the day of the accident had reached the bottom of the fifth floor. It appears that on the previous evening when they quit work they fastened the rope at the end of the scaffold. On the next morning after they had worked about 30 minutes plaintiff's fellow-worker, one Tower, stated that he was ready to lower down, and asked Harvey if he were ready, to which plaintiff replied that he had one more block to finish and for him to wait a minute. Just as Harvey in his work pushed against the building, his fellow-workman having perhaps lowered his own end of the staging about 8 inches, the scaffolding swung out from the structure, the rope slipped, plaintiff's end of the staging dropped to an angle of about 45 de-

grees, and he fell to the covering about 8 feet above the sidewalk and was injured. The plaintiff alleges that the scaffolding was extremely heavy, and on account of such extra weight more dangerous than an ordinary one of the same size; that defendant failed and neglected to provide any fastening to keep the staging from swaying, and that thereby it was so swung that plaintiff and his coworker attached to it certain lash or "tying-in" ropes by which the scaffolding was tied against the side of the building so that it could not swing out; that these ropes were tied to certain water or steam pipes in the interior, and while the staging was so securely fastened the defendants Patterson, Doyle & Beach, through the defendant Frenell, commanded and directed plaintiff and his coworker to loosen and remove the ropes and prevented them from using the same; that thereby the swinging scaffold was left without any lash ropes, and plaintiff was compelled to use the same when not rendered stable, not secured from swaying, and not provided with a sufficient safety rail or other device so as to prevent any person from falling therefrom; that such precautions could have been taken without interfering with the efficiency of the scaffolding or the discharge of the duties of the employees; that the scaffold was defective, insufficient and in a dangerous condition. The answer of the Corbetts asserts, in effect, that at the time of the injury plaintiff was solely in the employ of the Hurley-Mason Company, the contractor; that there was no privity of contract between the owners and plaintiff, and that the company had no control over him and had nothing to do with the scaffolding; that the injury was caused wholly by plaintiff's own carelessness in not keeping the ropes in a proper posi-

tion; that on August 6, 1912, plaintiff brought an action in the Circuit Court against Hurley-Mason Company for damages for said injuries, which proceeding was removed to the federal court, where the cause was tried, a verdict directed, and a judgment rendered in favor of the defendant Hurley-Mason Company; that the scaffolding in question was constructed according to an ordinance of the City of Portland. The answer of the other defendants is of much the same general tenor. There was a verdict and judgment for plaintiff. Defendants, except Frenell, appealed.

AFFIRMED.

For appellants there was a brief over the name of *Messrs. Senn, Ekwall & Recken*, with an oral argument by *Mr. Frank S. Senn*.

For respondent there was a brief over the name of *Messrs. Littlefield & Smith*, with an oral argument by *Mr. Isham N. Smith*.

MR. JUSTICE BEAN delivered the opinion of the court.

The action is brought under the Employers' Liability Act. As we understand the law, the guard-rail, which it is alleged the defendant failed to furnish, is required for protection generally and in case of a misstep or accident. It is unnecessary to conjecture as to how many times or under what circumstances the same would have been of service. The jury may have reasonably believed from the evidence that, if there had been a hand-rail available when plaintiff put up his hands and found nothing but a smooth wall, that he would have caught hold of it, saved himself from a fall, and prevented the injury. There was testimony to support such a belief. The statute also requires stag-

ing when more than 20 feet from the ground or floor to "be secured from swaying." It is shown by the evidence that in the use of a movable scaffolding like the one employed at the time of the accident it is customary to fasten the same to a building by "tying-in" ropes or wire. The act makes a definite command, both in regard to securing the scaffold from swinging and providing an efficient safety-rail. Therefore the failure to observe the mandate of the law on the part of the owners, contractors or subcontractors, and other persons having charge of, or responsible for, the work, renders the persons responsible therefor liable for any injury caused by such neglect. The primary purpose of staying such a "boat," as it is called by the employees, is to prevent its swaying. The manifest increase in the danger that might be caused by a staging swaying, whether tending to precipitate a fall or rendering the fastenings of the structure insecure by wearing or becoming displaced, is not specified in the act and need not be detailed. Suffice it to say that the requirements of the statute should be obeyed.

1. Substitutes not coming within the substantial specifications of the law do not take the place of devices specifically named in the act, nor excuse a non-compliance therewith: *McClagherty v. Rogue River Elec. Co.*, 73 Or. 135 (140 Pac. 64). The jury evidently concluded that one or both of the devices called for in the statute would have prevented the catastrophe, and that the want thereof was the proximate cause of the injury. The evidence warrants such a conclusion. It is appropriate for the city to ordain for the safety of workmen, and any rule so made not in conflict with the state law should be heeded (*Kalich v. Knapp*, 73 Or. 558 (142 Pac. 594)); but certain devices or things re-

quired by the city ordinance would not serve as a substitute for those which are distinctly directed to be provided by the act. There was therefore no error in the holding of the trial court that the statute controls.

Counsel for defendant requested the court to charge the jury as follows:

"I instruct you, if the scaffold upon which the plaintiff was working was constructed in accordance with an ordinance of the City of Portland which was in full force and effect at the time the plaintiff received his injury, there was no negligence in so constructing said scaffold."

This requested instruction, in effect, would inform the jury that, if the ordinance was complied with, the lack of a safety rail or fastening to prevent the scaffolding from swaying would not be material. Such is not the statutory mandate. This is not purely a local matter for the city to legislate upon under the Constitution. It is, however, a proper subject for the exercise of the police power of the state by the lawmakers. The statute says that such a structure, when at a certain height, shall be "provided with a strong and efficient safety rail or other contrivance so as to prevent any person from falling therefrom." It does not direct that one side or one end or any special part of the staging should be so guarded, but that there should be some contrivance "so as to prevent," etc. As to where the safety rail should be placed must necessarily depend upon the circumstances or conditions. When a staging is fastened to the side of a building, it is obvious that the structure would serve as such guard upon one side. The law does not seem to contemplate that the building would answer for that purpose under all conditions.

2. It is the position of defendant that the tie-in rope which fastened the staging damaged the woodwork on the inside of the building, and that it was therefore proper for the architect to discontinue such process. It does not appear but that some precaution could have been practicably taken by tying the rope so as to prevent any injury to the building, and such circumstances do not render a compliance with the statute unnecessary.

3. We come next to the very important investigation as to the liability of the Corbetts. It is the contention of the defendants that the Hurley-Mason Company was an independent contractor, and that it, and not the owners, was responsible for the details of the work and had full control of the employees. We have only to apply the plain provisions of the statute. The language of the text-writers and courts in other cases is helpful. The pertinent inquiries are: Who had the right to control the servants? Was Hurley-Mason Company acting merely by the authority of the owners? Or, in the language of the statute, who was the real employer of the plaintiff at the time of the injury? We considered a similar question in *Dalrymple v. Covey Motor Car Company*, 66 Or. 533 (135 Pac. 91, 48 L. R. A. (N. S.) 424).

Under the contract between the Corbetts and the Hurley-Mason Company, which is in evidence, it appears, in substance, that the owners contemplated the erection of a building at an estimated cost of \$600,000, and that the Hurley-Mason Company was employed, with its plant or equipment, by the Corbetts for the full compensation of \$20,000 as commission, as their agent to construct the building according to the plans and specifications. In the contract it was provided, among other things, that:

“The principal shall pay for all material used and all labor performed in the construction of the building, * * but the agent shall have the right to enter into contracts for and on behalf of the principal and in its name for the purchase of all necessary material and the hiring of necessary labor.”

All contracts, except as to minor matters, were to be submitted to the principal for approval. Hurley-Mason Company is distinctly referred to as the agent of the owners. If the cost of the building proved to be above the estimate, it did not affect the commission, and if it was built for less all rebates and discounts obtained by Hurley-Mason Company inured to the benefit of the owners. They had the right to employ a person for the inspection of any work or materials and the manner of conducting the business relative to the construction. The authority of the owners, acting through their chosen supervisor, was paramount to that of Hurley-Mason Company. This authority the owners exercised when their servant ordered the fastening of the scaffolding taken away from the building. The Hurley-Mason Company, as designated in the contract, was, in fact, the agent of the owners in the work of construction. Its authority, it is true, was great, but it was all derived from the Corbetts. The company was employed to construct the building as such agent, and was to be paid for its skill, judgment and experience. It was not an independent contractor. It would not change the effect of the contract if it were to be paid a salary by the month or year, instead of a commission.

In 1 Labatt's Master and Servant, page 126, the author states:

“A provision in an agreement which confers upon the superior employer the right of controlling the con-

tractor himself in respect to the details of the work must necessarily imply that he is to retain the right of controlling to the same extent the servants, who are the instruments through which the contractor performs the work; otherwise such a provision would be meaningless and ineffectual."

See, also, *Atlantic Transport Co. v. Coneys*, 82 Fed. 177 (28 C. C. A. 388).

In *Oregon Fisheries Co. v. Elmore Packing Co.*, 69 Or. 340 (138 Pac. 862), this court quotes from 26 Cyc. 966, as follows:

"The relation of master and servant exists whenever the employer retains the right to direct the manner in which the business shall be done, as well as the result to be accomplished; or, in other words, not only what shall be done, but how it shall be done."

See, also, *Swackhamer v. Johnson*, 39 Or. 383, 387 (65 Pac. 91, 54 L. R. A. 625); *Giaconi v. City of Astoria*, 60 Or. 36 (113 Pac. 855, 118 Pac. 180); *Ackles v. Pac. Bridge Co.*, 66 Or. 110 (133 Pac. 781); *Lawton v. Morgan, Fliedner & Boyce*, 66 Or. 292 (131 Pac. 314, 134 Pac. 1037); *Tamm v. Sauset*, 67 Or. 292 (135 Pac. 868); *Winniford v. MacLeod*, 68 Or. 301 (136 Pac. 25); *Lintner v. Wiles*, 70 Or. 350 (141 Pac. 871); *Fisher v. Portland Ry., L. & P. Co.*, 74 Or. 229 (143 Pac. 993); *Dibert v. Giebisich*, 74 Or. 64 (144 Pac. 1184); *Cockran v. Rice*, 26 S. D. 393 (128 N. W. 583, Ann. Cas. 1913B, 574); *Hoag v. Oregon-Wash. Corp.*, 75 Or. 588 (147 Pac. 756, 760).

4. 5. There was evidence in the case at bar from which the jury might reasonably find, and it appears that they did find, that Harvey was injured by reason of the interference with the manner of using the instrumentality which the Hurley-Mason Company supplied, necessary for preventing the staging from sway-

ing. The furnishing of this device was a nondelegable duty of the master. The order to take away the lash ropes was given by Frenell, the personal representative of Patterson, Doyle & Beach, architects, the servants of the Corbetts. They were not independent contractors.

Section 2 of the act declares:

“The manager, superintendent, foreman or other person in charge or control of the construction or works or operation, or any part thereof, shall be held to be the agent of the employer in all suits for damages for death or injury suffered by an employee.”

This section is applicable to the Corbetts. This phase of the case has been heretofore fully discussed. In *Lawton v. Morgan, Fliedner & Boyce*, 66 Or. 292 (131 Pac. 314, 134 Pac. 1037), on petition for rehearing, Mr. Chief Justice McBRIDE, in a terse discussion of the law, at page 300 of 66 Or., at page 1037 of 134 Pac., uses the following language:

“The plain intent of the law is to give the injured employee a remedy against his employer.”

Again on the same page it is stated:

“Now, plaintiff was not employed by defendants; neither had they any authority over him; and we would be compelled to read something into the law that is not written there to hold them liable.”

The first part of the above quotation is particularly applicable to the Corbetts, and the last to the Hurley-Mason Company, which was not responsible for the order to remove the fastening of the staging. No representative of that company had anything to do with taking away the same. Patterson, Doyle & Beach, through Frenell, ordered the rope which prevented the scaffolding from swaying to be removed, and the jury

by their verdict found them to be delinquent in this respect. Under the ruling in *Hoag v. Oregon-Wash. Corp.*, 75 Or. 588 (147 Pac. 756, 760), they violated their duty and are responsible therefor. There was no error in denying defendants' motions for a directed verdict. Counsel for defendants saved the rights of their clients by appropriate motions for a nonsuit made at the proper time, but there was no error in denying the same.

6. A careful consideration of the charge given to the jury leads us to believe that the case was fairly submitted under the Employers' Liability Act. After reading the statute the trial judge plainly explained the application thereof. It is settled that under the above statute assumption of risk is not a defense.

It follows, therefore, that the judgment must be affirmed as to the Corbetts and Patterson, Doyle & Beach, and it is so ordered. AFFIRMED.

MR. CHIEF JUSTICE MOORE, MR. JUSTICE EAKIN and
MR. JUSTICE HARRIS concur.

Argued June 29, affirmed July 13, 1915.

SOUTHERN PAC. CO. v. SIEMENS.

(150 Pac. 290.)

Mandamus—Demurrer—Conclusions.

1. On petition for *mandamus* to compel a county treasurer to accept the cash, and county warrants tendered in payment of taxes, a defense in an answer admitting the tender and refusal and asserting that the warrants were issued in an attempt to create a voluntary indebtedness in excess of the constitutional limitation, and the pendency of a suit in equity in the Circuit Court of the county and in the United States District Court involving the warrants, was not good as against a demurrer, because it rested largely upon legal conclusions.

[As to duties the performance of which may be compelled by *mandamus*, see note in 125 Am. St. Rep. 492.]

Mandamus—Defects—Cure by Subsequent Pleading.

2. An alternative writ of *mandamus* to compel a county treasurer to accept the cash and county warrants tendered in payment of taxes or to show cause for his refusal was not insufficient as not alleging that the money and warrants, tendered before the commencement of the proceeding, had been brought in the court, where the answer specifically admitted defendant's refusal to accept the tender, and admitted by failure to deny the averment of the petition and of the alternative writ that plaintiff was still ready and willing to make such tender and continued to make it.

Mandamus—Demurrer—Admissions.

3. In such case, the same allegation as to tender made in the writ was admitted by the demurrer thereto.

Tender—Payment into Court—Taxes.

4. Where the county treasurer, defending a *mandamus* proceeding to compel him to accept cash and county warrants in payment of taxes, admitted that the pleadings showed a tender, ability, and willingness to pay, a continuance of the offer, and a refusal to accept, he could not complain that the writ did not allege that plaintiff performed the futile act of bringing the money and warrants into court.

[As to *mandamus* to review decision of tax official, see note in Ann. Cas. 1912B, 786.]

Mandamus—Effect of Pending Suit—Questions Involved.

5. *Mandamus* to compel a county treasurer to accept money and county warrants, previously issued to plaintiff for the amount of plaintiff's overpayment of taxes, in payment of taxes for the following year, was not abated by suits in equity pending in the state Circuit Court and in the United States District Court to enjoin the payment of the warrants on the theory that they were void because representing an indebtedness in excess of the constitutional limitation, since there was a difference in the character of the relief asked for and obtainable in the suits and that relief sought by *mandamus*, and since the suits would not completely adjudicate the questions involved.

Counties—"Debt"—Warrants—Constitutional Limitation.

6. Warrants issued by the proper county authorities for the amount of an overpayment of taxes do not represent "debts" or liabilities, within Article XI, Section 10, of the Constitution, declaring that no county shall create any debts or liabilities which shall singly or in the aggregate exceed \$5,000, except to suppress insurrection or to repel invasion, and were valid.

From Klamath: HENRY L. BENSON, Judge.

Department 2. Statement by MR. JUSTICE HARRIS.

This is a proceeding by *mandamus* in which the Southern Pacific Company, a corporation, is plaintiff, and J. W. Siemens, as County Treasurer of Klamath

County, Oregon, is defendant. The facts are as follows:

The plaintiff owns in Klamath County a large amount of taxable property of which only a small part is personalty; the remainder being realty. The true amount of the taxes to be collected for the year 1912 on account of the personal property owned by the plaintiff was \$179.95. In the preparation of the rolls for the sheriff and tax collector, the assessor had omitted a decimal point in the valuation of the personal property. The omission of the decimal point had the effect of increasing the taxes on the personalty approximately 100 times more than the correct amount. After the tax-rolls had been placed in the hands of the sheriff, who was then the tax collector, the plaintiff paid to that officer \$17,454.99, being the full amount of the taxes appearing against the personal property of plaintiff, less a rebate of 3 per cent allowed by law. The error made by the assessor was overlooked by the sheriff and was not discovered by the plaintiff until about a month after payment, whereupon demand was made for a return of the difference between \$17,454.99, the sum paid, and \$179.95, the correct amount. Having expended the money, the proper authorities of Klamath County directed the issuance of warrants for the amount of the overpayment, and accordingly, on July 24, 1913, three county warrants for \$5,000 each and one for \$2,280.45 were issued to the plaintiff.

For the purpose of enjoining the payment of the warrants held by the Southern Pacific Company and others, a suit in equity was commenced in the Circuit Court for Klamath County on November 17, 1913, by Henry Rabbes, as plaintiff, against C. C. Low, Sheriff, J. W. Siemens, Treasurer, the Southern Pacific Com-

pany, and others. The complaint filed by Henry Rabbes avers that at all times since January 31, 1911, the outstanding voluntary indebtedness of Klamath County exceeded \$5,000, in violation of Section 10 of Article XI of the state Constitution; that the warrants issued to the Southern Pacific Company represented a part of the unlawful indebtedness, and on that account are unconstitutional and void; and that the warrants will be paid, unless the county officers are enjoined.

On March 2, 1914, the Weyerhaeuser Land Company, a corporation, and others, commenced a suit in equity in the District Court of the United States for the District of Oregon against J. W. Siemens, as Treasurer of Klamath County, and others, for the purpose of preventing the payment of the warrants held by the Southern Pacific Company and others; it being alleged in the petition that the voluntary indebtedness exceeded \$5,000, in violation of the state Constitution, and that the warrants held by the Southern Pacific Company were a part of the prohibited indebtedness.

The taxes levied against the entire property of the plaintiff for the year 1913 and payable in 1914 aggregated \$23,193.14. On March 30, 1914, the plaintiff attempted to pay its taxes then due by tendering to the defendant J. W. Siemens, as County Treasurer of Klamath County, upon whom had been imposed the duties of tax collector (Laws 1913, c. 184), the sum of \$12,793.24 in cash and two of the heretofore mentioned \$5,000 warrants upon which \$400 was due as interest, making a total tender of the full amount of the taxes. The offer was refused, and, upon the petition of plaintiff on March 31, 1914, a writ of *mandamus* was directed to the defendant commanding him to accept the cash and warrants tendered or to show cause for his refusal.

A demurrer to the writ having been overruled, the defendant filed a plea in abatement showing the pendency of the suit in equity wherein Henry Rabbes is plaintiff and J. W. Siemens, Treasurer, the Southern Pacific Company, and others, are defendants. The plea avers that the parties appearing in the writ of *mandamus* are also parties to the suit in equity; that the warrants held by the Southern Pacific Company are involved in both proceedings; and that a determination of the suit in equity would be decisive of the present controversy.

A demurrer to the plea in abatement having been sustained, the defendant interposed an answer admitting the tender and refusal to accept the cash and warrants in payment of the taxes levied against the property of plaintiff and asserting three separate defenses, the first of which was based upon the claim that the warrants held and offered by the plaintiff were issued in an attempt to create a voluntary indebtedness in excess of the constitutional limitation; the pendency of the suit in equity commenced by Henry Rabbes in the Circuit Court of Klamath County is invoked as a second defense; and the existence of the undetermined suit in the District Court of the United States for the District of Oregon is relied upon as the third defense. A demurrer to the answer was sustained, and, the defendant declining to plead further, a judgment was rendered commanding an acceptance of the cash and warrants by the county treasurer, who thereupon appealed.

AFFIRMED.

For appellant there was a brief over the name of *Messrs. Kuykendall & Ferguson*, with an oral argument by *Mr. Delmon B. Kuykendall*.

For respondent there was a brief over the names of *Mr. Ben C. Dey, Mr. William D. Fenton and Messrs. Stone & Gale*, with an oral argument by *Mr. Dey*.

MR. JUSTICE HARRIS delivered the opinion of the court.

1. The first affirmative defense appearing in the answer was vulnerable when assailed by demurrer because the defense rested largely upon legal conclusions: *O'Hara v. Parker*, 27 Or. 156 (39 Pac. 1004).

2. The defendant argues that the alternative writ is not sufficient because it fails to allege that the money and warrants tendered before the commencement of the *mandamus* proceeding had been brought into court. It must be remembered, however, that the answer specifically admits that the defendant refused to accept the tender made by the plaintiff; and, furthermore, the answer does not deny, and therefore admits, the averment appearing in both the petition and alternative writ that the plaintiff "is still able, ready and willing to make said tender, and continues to make the same." The question presented here does not involve the consideration of Section 574, L. O. L., which permits a tenderer in certain cases to evade liability for costs by bringing the amount of the tender into court and is not analogous to cases construing that section, like *Jacobs v. Oren*, 30 Or. 593 (48 Pac. 431); *McGee v. Beckley*, 54 Or. 250 (102 Pac. 303, 103 Pac. 61); *Anderson v. Griffith*, 51 Or. 116 (93 Pac. 934). The present controversy is likewise distinguishable from suits requiring the doing of equity before equitable relief can be asked for, as where a complainant concedes that he is justly liable for a certain sum but seeks to avoid payment of all in excess of that sum: *Welch v. Astoria*, 26 Or. 89 (37 Pac. 66); *Hamblin Real Est. Co. v. Astoria*,

26 Or. 599 (40 Pac. 230). The sole purpose of plaintiff is to compel the defendant to accept the money and warrants tendered, while the single design of defendant, evidenced by his resistance to the utmost, is to thwart the expressed desire of plaintiff. The defendant not only admits the tender, the ability, and willingness of plaintiff to pay and the continuance of the offer, but he also in effect declares that he will not accept the tender, unless compelled to do so by a final judgment of the court.

3, 4. The demurrer admits every fact pleaded in the writ, and therefore whether the question of tender is determined on the writ and demurrer thereto or on the writ and answer the admissions made by the defendant are the same; and when he concedes that the pleadings show a tender, ability and willingness to pay, a continuance of the offer, and at all times a refusal to accept, he cannot complain because the writ does not allege that the plaintiff performed the futile act of bringing the money and warrants into court. Idle ceremonies and vain things are not required by the law: *Eldriedge v. Hoefer*, 52 Or. 241 (93 Pac. 246, 94 Pac. 563); *Livesley v. Krebs Hop Co.*, 57 Or. 352 (97 Pac. 718, 107 Pac. 460, 112 Pac. 1); *Whitney Co., Limited, v. Smith*, 63 Or. 187 (126 Pac. 1000). A judgment for the plaintiff only affirms its right to pay and commands the defendant to accept the payment when the money and warrants are proffered. The judgment does not by its own force satisfy and cancel any indebtedness, but it merely defines a right which the plaintiff may exercise and a duty which the defendant must perform when the former makes use of the defined right.

5. The remaining assignment of error arises out of the ruling of the trial judge who held that the litiga-

tion pending in the Circuit Court for Klamath County and in the District Court of the United States for the District of Oregon did not necessarily abate the *mandamus* proceeding. The suits in equity were prosecuted on the theory that the warrants held by plaintiff and others are unconstitutional and void. The answer of defendant, in the *mandamus* proceeding, although not sufficient because pleading conclusions of law, seeks to question the validity of the warrants, and therefore the legality of the paper issued by the county is a question which could be involved in the instant case and is involved in the suits in equity. Decrees in the suits in equity declaring the validity of the warrants would afford some of the relief, but not all, sought by the writ of *mandamus*, because the decrees would proceed no further than to determine the worth of the warrants. If the paper is void, the county would be enjoined from paying. If the warrants are valid, the decrees would so declare; but, in such event, this plaintiff would still be obliged to call for the aid of a writ of *mandamus* if the County Treasurer should continue to refuse to accept the tendered warrants. All the relief sought by *mandamus* cannot be obtained in the suits in equity. There is also a difference in the character of the relief asked for. The suits will not result in a complete adjudication of the questions involved; and consequently the instant case is not necessarily abated by the prior litigation: 1 Cyc. 29; 1 C. J., § 92; 26 Cyc. 184.

6. Although the answer did not allege sufficient facts to support the legal conclusion of the defendant that the warrants are void, nevertheless, on the facts stated herein and conceded at the oral argument, there is no hesitancy in announcing that the inevitable conclusion

is that the warrants issued to the plaintiff are valid, and they do not represent the character of indebtedness which is prohibited by the Constitution.

The rulings made by the trial court were correct, and the judgment appealed from is affirmed.

AFFIRMED.

MR. CHIEF JUSTICE MOORE, MR. JUSTICE EAKIN and MR. JUSTICE BEAN CONCUR.

Argued June 28, reversed July 20, 1915.

MEAGHER v. EILERS MUSIC HOUSE.*

(150 Pac. 266.)

Landlord and Tenant—Deposit to Secure Rent—Action to Recover—Burden of Proof.

1. Where the lessee, suing for a deposit made as security for the rent, admits execution of the lease, but alleges that on his abandonment of the premises the lessor, under a provision of the lease authorizing him, on five days' default in payment of the monthly rent, to enter and repossess himself as of his former estate, entered on the premises or leased them to another, the burden is on the lessee to prove his discharge from the obligations of the lease by the act of the landlord.

Landlord and Tenant—Action for Deposit—Nonsuit.

2. Where the evidence in a tenant's action for a sum deposited as security for rent showed a reletting of the premises by the landlord such as could amount to a taking of repossession by him, and did not show that the reletting was subject to the rights of plaintiff or for his benefit, a motion for a nonsuit should have been denied.

[As to what amounts to eviction, see note in 17 Am. Rep. 62.]

Landlord and Tenant—Surrender of Lease—Acceptance.

3. Where a tenant offers to surrender, and the landlord, without expressly accepting the surrender, relets to another, an acceptance may be implied, and the tenant released from liability for rent after the reletting.

*The effect of reletting of premises by landlord on abandonment by tenant is discussed in the note in 13 L. R. A. (N. S.) 398.

REPORTER.

Pleading—Construction—Admissions.

4. Where the answer in a tenant's action for a sum deposited as security for rent, alleged that the premises were subject to plaintiff's order until November 30th, this was equivalent to saying that they were not subject to his order thereafter; and hence no part of the deposit could be retained by defendant to satisfy any installments of rent after November 30th.

Evidence—Admissions—Pleadings—Action for Deposit.

5. Where, in a tenant's action for a sum deposited as security for payment of rent, plaintiff alleged that a surrender of the lease had been accepted by defendant by reletting the premises, the complaint filed by the landlord in an action against the person to whom the premises were alleged to have been relet was admissible in evidence, where it contained admissions against the interest of the landlord in the instant case.

[As to right of landlord, who re-enters for condition broken, to retain rent paid in advance, see note in *Ann. Cas.* 1915B, 613.]

Appeal and Error—Review—Objections to Cost Bill.

6. Objections to the cost bill, which had not been decided by the trial court, could not be considered on appeal, though discussed in the briefs.

From Multnomah: THOMAS J. CLEETON, Judge.

Department 2. Statement by MR. JUSTICE HARRIS.

The Eilers Music House, a private corporation, on June 27, 1912, leased to D. V. Meagher a storeroom and room No. 616 in the Eilers Building, in Portland. At the time of the execution of the lease Meagher gave to the corporation \$550 as security for the payment of the rent, and he now seeks to have \$485.83 of the amount returned. By the terms of the demise the two rooms are rented to plaintiff for a period of four years and two months, commencing on July 1, 1912, and terminating on August 31, 1916; the amount of the rent to be paid for the term is \$13,750, payable in advance on the 1st day of each month in monthly installments of \$275; and the only remaining part of the writing material to the discussion is the following:

“The lessee further agrees that if the rent shall be in arrears for a space of five (5) days, or if the lessee

shall fail to keep or perform any of the covenants or conditions of this lease, then, in either event, the lessor may at its option enter into said premises and repossess itself as of its former estate and expel the lessee, or those claiming under him and the effects of either or all (forcibly, if necessary) without being deemed guilty of trespass, and without prejudice to any remedies which might otherwise be used for arrears of rent or preceding breach of covenant."

The complaint filed on February 17, 1914, alleges the terms of the agreement of lease, and that plaintiff deposited \$550 with defendant as security for the payment of the rent; that plaintiff entered and took possession and paid the monthly installments to and including September 1, 1913; that default was made in the payment of the installment due on October 1, 1913, and that on October 7, 1913, the lessor "elected to and did declare the said lease forfeited, and rented the same to one R. E. Farrell" under a verbal lease until November 7, 1913, when the defendant entered into a written lease for the period of four years and eleven months; that after deducting rent due on October 7, 1913, the date when defendant leased to Farrell, the sum of \$485.83 remains in the hands of defendant.

The answer admits the agreement of lease, the payment of the installments due prior to October 1, 1913, and the deposit of \$550 as security for the payment of the rent. For a separate defense the answer alleges that on October 7, 1913, the plaintiff vacated and abandoned the premises, and, acting through one Campbell, attempted to surrender the rooms, and left the keys at defendant's place of business; that when defendant learned of the abandonment it notified plaintiff that the premises were still at his disposal, but the plaintiff refused to take charge of the rooms; that when the \$550

deposit was made the parties agreed that the money should be used to apply on rent in the event of a default in the payment of any installments, and that, pursuant to such agreement, the defendant applied \$275 of the deposit on the rent due October 1, 1913; that on November 1, 1913, another installment became due, whereupon the defendant applied the remaining \$275 of the deposit on the rent for November; and that the leased premises were subject to the order of plaintiff and ready for him at all times until November 30, 1913. Except as affirmatively stated in the complaint, the averments of the answer are denied by the reply. A jury having been waived, a trial by the court resulted in a judgment of nonsuit, from which the plaintiff appealed.

REVERSED.

For appellant there was a brief and an oral argument by *Mr. W. L. Cooper*.

For respondent there was a brief and an oral argument by *Mr. Virgil A. Crum*.

MR. JUSTICE HARRIS delivered the opinion of the court.

Testimony to the effect that the storeroom leased to the plaintiff is known as room 4, and also No. 144 Broadway, a certified copy of a complaint, and a certified copy of an order adjudging Farrell to be in default in an action at law wherein the Eilers Music House appears as plaintiff and R. E. Farrell is named as defendant constitute all the evidence offered by plaintiff. The certified copy of a complaint discloses that the Eilers Music House sought to recover \$500 from R. E. Farrell on two causes of action, one of

which is founded upon the claim that Farrell had on October 7, 1913, leased a store on the ground floor facing Broadway in the Eilers Building for \$250 for one month; and it is related in the second cause of action that on November 7, 1913, the Eilers Music House and Farrell entered into a written agreement whereby the latter leased No. 144 Broadway for a term of four years and eleven months at a rental of \$250 per month, payable on the 7th day of each month, and that on December 7th the sum of \$250 became due, and had not been paid. No evidence was offered by plaintiff to show whether the room rented to Farrell on October 7th was room 4 or No. 144 Broadway, or was the same room that was leased to him on November 7th, although at the trial counsel for defendant admitted:

“That we permitted Farrell to occupy or go in there from day to day, with the understanding that he must get out as soon as the other man would return.”

The contention of plaintiff proceeds upon the theory that evidence of a reletting by the corporation is enough to warrant a finding that the lease was terminated, and that therefore he is entitled to recover the deposit less the amount of rental due on October 7th, when the reletting occurred; and the position of defendant is that proof of a reletting does not justify a finding that the agreement of lease was constructively or otherwise ended. The plaintiff does not allege a technical surrender of the premises, nor does he claim that defendant agreed to release him, but he rests his right to recover upon the allegation that the “defendant on the 7th day of October, 1913, elected to and did declare the said lease forfeited, and rented the same to one R. E. Farrell.” The reason for the leasing to Farrell does not appear, except as detailed in the answer,

which, however, is denied by the plaintiff, so that the situation presented here is one where there is an agreement of lease binding the plaintiff for a definite period, a default in the payment of rent, a reletting and a provision in the written agreement giving the landlord the right to re-enter and "repossess itself as of its former estate" in case the rent shall be in arrears for a space of five days "without prejudice to any remedies which might otherwise be used for arrears of rent or preceding breach of covenant."

1, 2. Having admitted the making of the agreement of lease which obligates him to pay rent, the plaintiff must, as a part of his case, offer evidence tending to show some occurrence which either lessens or extinguishes the obligation assumed by him, because the plaintiff is by his own admission liable for the full amount of the stipulated rent, unless in the language of the complaint the defendant "elected to and did declare the said lease forfeited and rented the same to one R. E. Farrell." If the landlord did "repossess itself as of its former estate," and relet to Farrell, then plaintiff was relieved from the stipulations of the lease. The evidence showing a reletting to Farrell fails to disclose that the room was rented subject to the rights of Meagher or for his benefit, but it tends to reveal the contrary. The evidence offered by plaintiff tended to show the fact of reletting of a character which would be sufficient to authorize a finding that defendant had, pursuant to the terms of the written agreement, repossessed itself "as of its former estate," in which event the plaintiff would only be liable for arrears of rent or preceding breaches of the contract; and therefore the motion for a judgment of nonsuit should have been denied. In *Ladd v. Smith*, 6 Or. 317, a surrender

of a lease was by operation of law implied from a reletting.

3. There is nothing in the record binding upon plaintiff and tending to show that the reletting was for his benefit, as alleged in the answer; but, if the tenant offered to surrender, and the landlord without accepting the surrender relet to Farrell, under all the circumstances recited in the answer, then the rule announced in *Bowen v. Clarke*, 22 Or. 566 (30 Pac. 430, 29 Am. St. Rep. 625), *Humiston v. Wheeler*, 175 Ill. 514 (51 N. E. 893), *Respini v. Porta*, 89 Cal. 464 (26 Pac. 967, 23 Am. St. Rep. 488), and kindred cases, becomes applicable.

4. In his primary pleading the plaintiff concedes the right of the defendant to rent for the first seven days in October. No part of the deposit can be retained by the defendant to satisfy any installments after November 30, 1913, because the allegation in the answer that the premises were subject to the order and ready for the occupancy of plaintiff at all times until November 30, 1913, is equivalent to saying that the premises were not subject to the order of plaintiff or ready for him after November 30, 1913.

5. The complaint filed by the Eilers Music House in the action against Farrell is relevant evidence, because it contains certain admissions or declarations against the interest of the defendant in the instant case, and the fact that Meagher was not a party to that proceeding does not affect the competency of the evidence: *Feldman v. McGuire*, 34 Or. 309 (55 Pac. 872); *Murphy v. Hindman*, 58 Kan. 184 (48 Pac. 850); 16 Cyc. 1050. The only objection offered to the certified copy received in evidence was that it is irrelevant and immaterial. The paper received may be subject to ob-

jections not presented, although it is not vulnerable to the objection specified.

6. The objections to the cost bill have not yet been decided by the trial court, and consequently no question arising out of the cost bill is now presented, although the briefs discuss objections to certain items of the disbursements.

The judgment is reversed and the cause is remanded for a new trial.

REVERSED AND REMANDED.

MR. CHIEF JUSTICE MOORE, MR. JUSTICE EAKIN and MR. JUSTICE BEAN CONCUR.

Argued June 29, affirmed July 20, 1915.

ROSE v. SALEM.

(150 Pac. 276.)

Municipal Corporations—Powers of.

1. Where the charter of a city authorized the council to prevent domestic animals from running at large, and to license, tax, impound, sell or kill dogs, the council might prohibit the running of dogs at large, under penalty of their being impounded and ultimately killed.

[As to general features and constitutionality of statutes respecting estrays, 8 Am. St. Rep. 271.]

Constitutional Law—Due Process of Law—What Constitutes.

2. An ordinance prohibiting the running of dogs at large provided that they should be impounded, and that, if known, notice should be given to the owners or custodians, who could redeem within three days, the dogs to be killed at the end of that time. Held, that Section 5731, L. O. L. making it larceny to steal a dog, recognizes it as property, and the ordinance was invalid, as working a deprivation of property without due process of law, not providing for notice, actual or constructive, to the owners or custodians of dogs seized.

From Marion: WILLIAM GALLOWAY, Judge.

In Banc. Statement by MR. JUSTICE BENSON.

This is a suit by George L. Rose against the City of Salem, a municipal corporation, J. T. Welch, city mar-

shal of Salem, and E. S. Budlong, street commissioner of said city, to restrain the enforcement of a municipal ordinance of the City of Salem, which reads as follows:

"Section 1. It shall be unlawful, from and after the 10th day of June, 1914, for any person, firm or corporation, who may own or be the custodian of any dog, to permit any such dog to run loose or be at large upon any of the public streets, highways or other public places within the corporate limits of the City of Salem, Oregon. All dogs found upon any of the public streets, highways or other public places in the City of Salem, Oregon, shall be deemed to be running loose or be at large within the meaning of this ordinance, except such dogs as may be under control by means of a chain or leash or may be in or upon any vehicle and while so therein or under the personal control of the owner or custodian thereof.

"Sec. 2. It shall be unlawful for any dog to run loose or at large upon any of the public streets, highways or other public places in the City of Salem, and the street commissioner or his agents are authorized to impound any dog found running loose or at large as defined in this ordinance, and are also authorized to enforce all of the other provisions of this ordinance, subject to the general direction and control of the street committee of and the council to carry this ordinance into effect the street commissioner, and his agents, are authorized to use any of the equipment and property of the city under the control of the street department.

"Sec. 3. Whenever any dog shall be impounded under authority of this ordinance, the street commissioner, his agents or deputies, in charge of the work hereunder, shall forthwith give notice to the owner or custodian of any impounded dog if such person is known to the street commissioner, or his agents in charge of the work hereunder, and if the owner or custodian so notified does not claim said dog within the period of three (3) days from the date of said notice

and also pay the redemption fee provided for herein, such dog shall be humanely killed at the expiration of said period.

"Sec. 4. Whenever any dog shall be impounded under the authority of this ordinance and the owner or custodian thereof is unknown to the street commissioner or his agents acting under this ordinance, such dog shall be kept for the period of three (3) days and if at the end of the said time the owner or custodian shall not appear and claim such dog and pay the redemption fee provided herein, such dog shall be killed.

"Sec. 5. Any dog impounded under authority of this ordinance may be released to the owner or custodian thereof by the street commissioner upon payment to the city treasurer of the sum of two (2) dollars upon the first impounding and the sum of four (4) dollars upon any second or subsequent impounding.

"Sec. 6. The street commissioner is hereby authorized to deliver to any person any dog impounded under this ordinance, after the expiration of three (3) days from the time of impounding upon payment to the city treasurer of the redemption fee of \$2 in the case of the first impounding or upon the payment of the sum of \$4 in the case of a second or subsequent impounding of any such dog. Such delivery shall be subject to the claim of the rightful owner of said dog and the payment by him of the redemption fees paid to the city and the reasonable expense of keeping the said dog up to the time of claim by the owner. The street commissioner at the time of making any such delivery, shall take a written receipt from such person acknowledging that such person holds the said dog subject to the claim of the rightful owner upon the payment of the redemption fees paid by such person and the reasonable expense of keeping such dog up to the time of claim by such owner, and it shall be unlawful for the street commissioner to deliver a dog to any person under the provisions of this section without receiving the receipt herein provided for.

"Sec. 7. All periods of time named in this ordinance shall be computed by excluding from the computation, the day upon which the impounding shall be made.

"Sec. 8. The street commissioner shall keep a duplicate record of dogs impounded, which shall show the date and time when impounded, a description by approximate weight, age, color, sex and breed where feasible, with the owner or custodian's name if the name is known, and in said record an entry shall be made of the disposition made of said dog. The duplicate and all delivery receipts shall be filed monthly with the city recorder and be deemed public records of the City of Salem, Oregon.

"Sec. 9. It shall be unlawful for any person to in any way interfere with any person engaged in seizing or impounding any dog under authority of this ordinance, and any person convicted of a violation of the provisions of this section shall be punished as provided for in Section 12 hereof. Any person who may encourage or urge any dog to attack or worry any person engaged in enforcing the provisions of this ordinance, or who shall threaten any such person while engaged in the performance of duties under this ordinance, shall be deemed guilty of interfering with the enforcement of this ordinance within the meaning of this section.

"Sec. 10. The expense of caring for dogs impounded under this ordinance shall be paid out of the general fund of the City of Salem, and all moneys paid in redemption fees shall be credited to the general fund of the city.

"Sec. 11. Any person owning or having in charge any female dog who shall permit the same to run at large while in heat, shall upon conviction thereof, be punished as for a violation of this ordinance.

"Sec. 12. Any person violating any of the provisions of this ordinance shall, upon conviction, be punished by a fine of not less than ten (\$10) dollars nor more than one hundred (\$100) dollars, or by im-

prisonment in the city jail one day for each two dollars of any such fine."

The cause was heard upon a motion for judgment upon the pleadings, and a decree entered in favor of plaintiff, from which defendant appeals.

AFFIRMED.

For appellants there was a brief and an oral argument by *Mr. William H. Trindle*, City Attorney.

For respondent there was a brief over the names of *Mr. John H. McNary* and *Messrs. Turner & Turner*, with oral arguments by *Mr. McNary* and *Mr. Frank A. Turner*.

MR. JUSTICE BENSON delivered the opinion of the court.

1. Plaintiff contends that the ordinance is void, for the reason that its provisions exceed the authority of the city council. It may be conceded at the outset that municipal corporations can exercise no powers but such as are expressly conferred upon them by the act of incorporation, or are necessary to carry into effect the powers thus conferred, or are essential to the manifest objects and purposes of the corporation. Section 18 of the charter authorizes the council "to prevent domestic animals from running at large within the city, or any portion thereof; to provide for impounding and selling such animals." Section 42 authorizes the council "to license, tax, impound, sell or kill dogs." There can be no serious question but that the charter gives the council ample authority to prohibit dogs from running at large. We do not need to cite any further authority than the above sections to satisfy this conclusion.

2. There remains, then, a consideration of the ordinance itself. It will be noted that Sections 3 and 4 thereof provide for the impounding of dogs found running at large and for notice to the owners or custodians, if they are known to the street commissioner or his assistants, and, further, that if the dogs are not redeemed within three days they are to be summarily killed. Plaintiff contends that this procedure violates the fundamental principle that no person should be deprived of his property without due process of law. We think that this contention is correct. It is true that the courts of last resort in many of the states have held that similar ordinances are not obnoxious to this doctrine, and are to be upheld as a valid exercise of police power; but in all cases of this sort, which have been called to our attention, emphasis is laid upon the assumption that dogs are property in a limited or qualified sense only, and they invariably comment upon the fact that at common law such animals were not the subject of larceny. It is true that at common law they were held not to be the subject of larceny, and the historical reason for such holding is found in the fact that at that time larceny was a capital offense, and the courts rebelled at the thought of putting a man to death for stealing a dog. However, in this state it is larceny to steal a dog, and that animal is expressly declared by statute to be personal property: Section 5731, L. O. L.

Whatever may be the law in other jurisdictions, in this state dogs are regarded as being just as important a class of personal property as any other domestic animal and equally entitled to the protection of the law. In Illinois it has been held that a statute providing for the impounding and sale of domestic animals

without a judicial hearing and without actual or constructive notice to the owner is void: *Poppen v. Holmes*, 44 Ill. 362 (92 Am. Dec. 186). The same doctrine is held in the following cases: *Slessman v. Crozier*, 80 Ind. 487; *Campbell v. Evans*, 45 N. Y. 360. An ordinance could doubtless be readily framed which would accomplish the purposes desired, and yet protect private property from forfeiture or destruction without due process of law.

The ordinance in question is objectionable in this particular, and the decree of the lower court is affirmed.

AFFIRMED.

Argued June 7, affirmed July 20, 1915.

KVESET v. GRACE & CO.

(150 Pac. 281.)

Master and Servant—Injuries to Servant—Defenses.

1. Where plaintiff, a stevedore, was hurt in doing work which involved the use of machinery, his cause of action comes within the Employers' Liability Act (Gen. Laws 1911, c. 3), and the defenses of assumption of risk and of negligence of a fellow-servant cannot be urged, nor will plaintiff's own contributory negligence completely bar recovery.

[As to assumption of risk under Federal Employers' Liability Act, see note in *Ann. Cas.* 1915B, 481.]

Damages—Instructions—Validity.

2. An instruction that the jury should disregard any feelings of sympathy because of plaintiff's injuries, but that, if plaintiff had a good cause of action, the jury should not steel themselves not to be sympathetic, it being the duty of the jury to exercise their hearts as well as brains, is erroneous, practically directing verdict according to the jury's sympathies.

Appeal and Error—Review—Harmless Error.

3. Under Article VII, Section 3, of the Constitution, it is the duty of the Supreme Court, when the transcript on appeal contains all the proceedings below, to examine the record and determine whether an error was so harmful as to require reversal.

Appeal and Error—Damages—Personal Injuries—Measure.

4. Where plaintiff suffered a Pott's fracture of the ankle, which in the consensus of medical opinion would be permanent, and it appeared that plaintiff could do very little walking on the injured leg nearly a year after the accident, and that before he had been earning at least \$4.50 a day as a stevedore, an award of \$3,100 cannot be held excessive; hence an instruction that the jury should use their hearts as well as their minds in assessing damages was not prejudicial.

From Multnomah: HENRY E. MCGINN, Judge.

Department 2. Statement by MR. CHIEF JUSTICE MOORE.

This is an action by Harry L. Kveset against W. R. Grace & Company, a corporation, and Fred Miller, to recover damages for personal injury. The facts are that on September 1, 1913, the plaintiff, Harry L. Kveset, was employed by the defendant W. R. Grace & Co., a corporation, and with others was engaged at St. Johns, Oregon, in discharging lumber from a ship by means of derricks having tackle which was operated by machinery. The vessel's hatchways were so large that there were placed across each of them two heavy steel beams, called strongbacks, to support the hatches. Most of the deck-load having been taken off, the covering of hatchway No. 3 was removed, and the strongbacks were withdrawn and placed by the defendant's foreman on timbers, but they were not secured in any manner. As the plaintiff was working near this hatchway, the steel beams, probably moved gradually by the vibrations of the ship resulting from the operation of the derrick machinery, fell upon his left ankle, breaking near that joint the tibia in two places, and splitting and pushing back the fibula, producing what is generally known as a Pott's fracture. The complaint states the facts as hereinbefore detailed, and alleges the defendant was negligent in failing to secure the strongbacks, in consequence of which care-

lessness the plaintiff was injured, and sustained damages in specified sums which were demanded. The answer denies the negligence charged, and sets up as affirmative defenses the carelessness of fellow-servants, the plaintiff's assumption of risk, and his contributory negligence. The reply controverts the allegations of new matter in the answer, and, the cause having been tried, resulting in a verdict for the plaintiff in the sum of \$3,100 general damages and \$219.25 special damages for hospital dues and medical attention, and a judgment given therefor, the defendant appeals.

AFFIRMED.

For appellants there was a brief over the names of *Mr. F. C. Howell*, *Messrs. Wilbur, Spencer & Beckett* and *Mr. A. L. Clark*, with an oral argument by *Mr. Howell*.

For respondent there was a brief over the names of *Mr. H. W. Strong*, *Mr. Isham N. Smith*, *Mr. John F. Logan* and *Mr. H. Daniel*, with oral arguments by *Mr. Strong* and *Mr. Smith*.

Opinion by MR. CHIEF JUSTICE MOORE.

1. The court, refusing to instruct as requested by the defendant's counsel, told the jury, in effect, that the defenses of assumption of risk, and of injury caused by fellow-servants were not available to the facts involved, and that the averment of contributory negligence was not an absolute bar to the plaintiff's recovery, but should be taken into account in determining the amount of his damages, if any had been sustained by him. Exceptions were taken to the court's action in these particulars, and it is contended that errors were thereby committed. When the plain-

tiff was hurt, a great part of the work in which he was engaged was performed by machinery, and, this being so, his cause of action comes within the provisions of the Employers' Liability Act, and no errors were committed in charging the jury as stated: Gen. Laws Or 1911, c. 3; *Dunn v. Orchard Land Co.*, 68 Or. 97 (136 Pac. 872); *Lang v. Camden Iron Works*, 77 Or. 137 (146 Pac. 964).

2. The court gave, *inter alia*, the following instruction:

"There is a request made here to charge the jury in regard to sympathy. It says that you are to 'disregard any feeling of sympathy that you may have for the plaintiff in this case, and to base your verdict entirely upon the evidence and the instructions of the court.' Now, that is true. The law says that a man shouldn't give a verdict just because of sympathy, but, if the plaintiff has a good cause of action, you needn't steel yourselves and say, 'Here, the court said we shouldn't give him a verdict through sympathy, and I have got to get up here and steel myself and not be sympathetic.' If the man is entitled to recover, you will remember that you are ordinary men taken from the community; that you exercise your hearts as well as your brains, and you shouldn't be deterred just because somebody might charge you with being sympathetic. If the testimony shows that he has a good cause of action, and you believe from the testimony that he is entitled to recover, give him a verdict. If he isn't entitled to recover, don't give him a verdict merely because you are sorry for him."

The defendant's counsel, before the jury retired, made the following statement to the court:

"I should like an exception to the refusal of the court to give those instructions asked and not given, or as given and modified. * * I should like an exception * * to the limitation placed by the court on the instruc-

tion relative to sympathy, which was asked for by the defendant."

"The trial judge," says Mr. Justice GOSE, in *Wheeler v. Hotel Stevens Co.*, 71 Wash. 142, 146 (127 Pac. 840, 842, Ann. Cas. 1914C, 576, 578), "may, and where there is a seeming necessity should, caution the jury not to allow sympathy or prejudice to influence their verdict."

To the same effect, see Blashfield's Instructions to Juries, Section 344, where this author remarks:

"As regards the necessity of giving such instructions, there is some diversity of opinion. A request for a caution of this nature may, of course, be refused, if there is nothing in the circumstances of the case which would make it proper. And authority is not wanting for the position that it is within the court's discretion whether such an instruction shall be given in any case."

An examination of the instruction complained of will show that the use of the phrase "just because" was equivalent to telling the jury that sympathy for a person injured by the alleged negligence of another was an element to be considered in determining the damages sustained, but not the exclusive ingredient. The further declaration imputed to each juror, "I have got to get up here and steel myself and not be sympathetic," was tantamount to a command to be compassionate. Telling the jury, "You exercise your hearts as well as your brains," was the same as inviting their commiseration. The word "heart," as used in the language quoted, was undoubtedly employed to represent the seat of the affections, emotions, feelings and passions, as contradistinguished from the abode of the intellect and the will. In the trial of causes jurors should be admonished, when deemed necessary by the court, to lay aside pathos and prejudice, carefully to weigh the evidence received, and from it alone, guided

by the court's instructions, determine the issues submitted to them. Juries are not required or even expected to "exercise their hearts" in reaching a verdict, and the invitation to do so, as given in the instruction challenged, was erroneous.

3. The rule formerly prevailing in this state was that, where error appeared, prejudice would be presumed, in which case a reversal of the judgment would inevitably result, unless it was manifest that no injurious consequences arose from a misapplication of the law. In the case at bar there is attached to the bill of exceptions a copy of the entire testimony received at the trial and of the instructions that were given and those that were refused. When such a transcript has been brought up it is now necessary, under an amendment to the organic law of the state, to examine the record with care and determine whether the judgment should be affirmed notwithstanding the error: Article VII, Section 3 of the Constitution. The question to be considered is whether, from an examination of the entire testimony, it can affirmatively be said that the verdict for \$3,100 is excessive by reason of any sympathy that the jury may have exercised in behalf of the plaintiff.

4. The testimony shows that the plaintiff is a long-shoreman, having worked at that business 8 years prior to his injury, and for his services received \$4.50 a day. If he was employed more than 9 hours in any one day, he was paid 75 cents an hour for the extra time. He was robust, and from the American Mortality Tables has an expectancy of 33 years. The plaintiff, in speaking of his injured foot, testified:

"It swells up every afternoon. * * When I work a little it swells up more."

In answer to the question, "Does that foot affect you now?" Kveset replied:

"Well, if I walk all day it gets weak, you know. I can walk on the level, but if I step on something round my foot turns and hurts, you know."

Dr. B. N. Wade, who waited upon the plaintiff when he was hurt, in speaking of the injury at that time, testified:

"The outer bone was fractured just above the ankle, and it turned in an oblique direction, and the inner bone was broken, and the fracture extended down quite a little bit. That was due to the turning of the foot, somewhat.

"Q. From your examination of him recently, will you state what the condition of his foot and ankle is?

"A. There is a little swelling there yet, and it seems to come up badly evenings, and the joint is weak.

"Q. Is that ankle liable to turn on him when he walks?

"A. It is liable to turn on him when he walks, because the ligaments are torn off, and the joint is weak, and if he got any sudden twisting of this ankle it would become dislocated again."

In alluding to the foot and ankle this witness was asked: "You think that in its present condition that it is practically permanent?" He answered: "Yes, sir."

Dr. J. G. Swenson testified that the plaintiff's foot is permanently injured. In answer to the inquiry, "I wish you would kindly tell the jury in your own way what his present condition is, that is, of his left foot," the witness said:

"Why, the present condition of his left foot is one of an injured ankle on both sides, both bones, the outer and the inner, the tibia and the fibula have been fractured, resulting in a weakened ankle, an ankle that interferes with his locomotion and with his work."

Further referring to the plaintiff and to the injury he had received, Dr. Swenson stated upon oath:

"He hasn't the use of the ankle. It interferes with him a great deal. * * It is a severe injury to the ankle."

Dr. Ralph C. Walker who took X-ray photographs of the plaintiff's injury 3 days after he was hurt was asked: "How far are those fractures above the joint?" The witness replied:

"They are right in the joint, not above it; well, one of these breaks is about an inch above, on the fibula, and extends right down into the joint; and the one on the tibia extends into the joint.

"Q. Is that condition that you found there permanent, Doctor?

"A. Yes, sir; it is."

Dr. R. J. Marsh, as the defendant's witness, testified that 51 days after the injury he examined the plaintiff's hurt, and found that:

"He had a fracture, what was called a Pott's fracture, in the lower end of the tibia and the lower end of the fibula, the two bones of the leg."

The defendant's counsel, referring to the time of the trial, which was more than 8 months after the injury, inquired:

"Now, assuming that this man has at the present time a swelling of the ankle of one inch—there is a swelling to that extent—I will ask you whether, in your opinion, it would be reasonable to expect a swelling of that amount at this time after the break?"

The witness replied:

"Well, I think you very often see that. I would expect the swelling to go down; to have it diminished in size during the next few months. In other words, I don't believe there will be a permanent enlargement of

that amount. It probably will always be a little larger, but not that size."

This doctor further testified in relation to the hurt:

"There may be a little deformity, a little permanent deformity there, but I don't look for any permanent disability."

The foregoing is a fair epitome of the testimony relating to the extent of the plaintiff's injury. A perusal of the sworn statements of these physicians will convince any person that the hurt was severe. In the notes to the case of *Cleveland etc. R. Co. v. Hadley*, 16 Ann. Cas. 1, 14, will be found many decisions determining what sums awarded by juries as damages for the fracture of one leg were not regarded as excessive verdicts. These adjudications vary from \$9,000 to \$350. One of the cases mentioned in the annotations referred to is that of *St. Louis etc. R. Co. v. Woolum*, 84 Tex. 570 (19 S. W. 782), where for a hurt resulting from the fracture of both bones of his right leg at the ankle joint, causing a permanent injury, attended with long suffering and making him a cripple for life, a brakeman hurt while discharging his duty was allowed \$4,000, and it was held the verdict was not excessive. The hurt in that case appears to be so similar to the injury which the plaintiff herein sustained that we conclude the award of \$3,100, the general damages given, shows the verdict was not excessive or induced by the erroneous charge to which reference has been made.

The jury, having retired to consider their verdict, returned for further instructions, whereupon one of their number inquired if they had authority under the demand in the complaint for judgment for general and special damages and costs and disbursements, to fix the amount of attorney's fees. The court replied: "You have not." This request for further instruc-

tions evidently did not manifest a desire to express sympathy for the plaintiff, but only to discharge a duty which the jury thought devolved upon them under the prayer for judgment as demanded in the initiatory pleading.

From an examination of a transcript of the entire testimony and the charge as given by the court, it is believed that substantial justice has been administered, and that the determination of the trial court should be upheld notwithstanding the error complained of: *Hoag v. Washington-Oregon Corp.*, 75 Or. 588 (147 Pac. 756).

It follows that the judgment should be affirmed, and it is so ordered.

AFFIRMED.

MR. JUSTICE EAKIN concurs.

MR. JUSTICE BEAN concurs in the result.

MR. JUSTICE HARRIS delivered the following dissenting opinion.

I do not concur, for the reasons stated in dissenting from the majority opinion in *Hoag v. Washington-Oregon Corp.*, 75 Or. 588 (147 Pac. 756, 766).

Argued June 21, defendant disbarred July 20, 1915.

STATE EX REL. v. GARLAND.

(150 Pac. 289.)

Attorney and Client—Disbarment—Evidence.

1. Where the disbarment of an attorney is sought under Section 1092, L. O. L., as guilty of any willful deceit or misconduct in his profession, and such attorney has borne a good reputation in the community in which he lived, competent evidence against him should show that the accusation is true to justify disbarment.

[As to the causes and proceedings for disbarment of attorneys and the power of courts to disbar, see notes in 95 Am. Dec. 333; 45 Am. St. Rep. 71.]

Attorney and Client—Disbarment—Conversion of State Funds—Statute.

2. Under Section 1092, L. O. L., providing that an attorney may be removed or suspended by the Supreme Court for being guilty of any willful deceit or misconduct in his profession, where an attorney was appointed special prosecutor for the state in proceedings to escheat certain property of a decedent, and, as such, received a check representing state funds due it in the proceedings, which he deposited to his individual bank account and converted wrongfully, withholding the amount from the state, and failing, refusing and neglecting to account therefor, he will be disbarred for the proper administration of justice, the protection of the public, of clients, of the courts, and the dignity of the legal profession.

Original proceeding in Supreme Court.

This is a proceeding for the disbarment of Charles W. Garland, instituted by the State of Oregon, upon the relation of John McCourt, John H. McNary, O. P. Coshow, Loring K. Adams and Alfred Hampson, members of the Grievance Committee of the State Bar Association.

DEFENDANT DISBARRED.

For the State there was a brief and an oral argument by *Mr. Elton Watkins*.

For defendant there was a brief over the names of *Mr. William P. Lord* and *Mr. Charles W. Garland*, in *pro. per.*, with an oral argument by *Mr. Lord*.

In Banc. MR. JUSTICE BEAN delivered the opinion of the court.

The case is based upon that part of Section 1092, L. O. L., which provides that an attorney may be removed or suspended by the Supreme Court “(3) for being guilty of any willful deceit or misconduct in his profession.” It is set forth in the accusation made by the committee that Charles W. Garland is an attorney at law residing in the county of Multnomah, and admitted to practice in the Supreme Court of this state. Prior to January 5, 1911, he was duly appointed

special prosecutor and attorney for the State of Oregon to prosecute certain proceedings then pending in the Circuit Court of the State of Oregon for Multnomah County to escheat to the state property belonging to the estate of Charles Scheller, deceased. As such attorney for the state, on January 5, 1911, Garland received from F. S. Fields, County Clerk of Multnomah County, a check on the Merchants' National Bank of Portland, Oregon, for the sum of \$709.87, payable to C. W. Garland as attorney, the same being money belonging to the state and arising out of the escheat matter. On January 6, 1911, C. W. Garland knowingly, corruptly, willfully, criminally and feloniously misappropriated and converted the above sum to his own use by depositing the money in his individual name to his own personal account in the bank of Hartman & Thompson, Portland, Oregon, has never accounted to the state for said money, but has ever since wrongfully and unlawfully withheld the same from the state and converted it to his own use, and has failed, refused and neglected to account therefor. The answer of Mr. Garland asserts that the money collected was delivered "at the office of the sheriff of Multnomah County, Oregon, for transmission to the proper official at Salem, Oregon," after deducting expenses and attorney's fees allowed.

1. The evidence taken in writing by a referee is of record, and need not be here set forth. That of reputable citizens and high officials is to the effect that Mr. Garland has heretofore borne a good reputation in the community in which he lives, therefore, under the circumstances, we think the competent evidence should clearly show that the accusation against the attorney is true: *Ex parte Cowing*, 26 Or. 572 (38 Pac. 1090).

2. A careful reading of all the evidence pertaining to the written charge convinces us beyond a reasonable doubt that the accusation against Mr. Garland is true, and that he is guilty of willful deceit and misconduct in his profession as an attorney in the escheat proceedings in failing and neglecting to account for the sum of \$627.37, according to the nature of his trust, and converting the same to his own use as alleged in the charge. A portion of the amount collected has been paid for the expenses of the case, and \$75 allowed as attorney's fees therein. The proper administration of justice, the protection of the public, of those who may be clients, and of the courts, and the dignity of the legal profession demand that he be disbarred from practicing as an attorney in any of the courts of the State of Oregon, and it is so ordered.

DEFENDANT DISBARRED.

Argued May 28, reversed July 20, 1915.

BARR v. WORLD KEEPFRESH CO.*

(150 Pac. 747.)

Mechanics' Liens—Lien Notice—Lump Charge—Nonlienable Items.

1. If nonlienable items are contained in the lump charge made in a lien notice, no lien is acquired.

Mechanics' Liens—Lienable Items—Board and Expenses.

2. The compensation provided by a building contract being the reasonable worth of the labor and material, board and expenses, paid for by the contractor as part of the cost of or compensation for the labor and material, are lienable.

Mechanics' Liens—Foreclosure—Complaint.

3. In the absence of attack by demurrer or motion, the complaint in mechanic's lien foreclosure, though not specifically alleging the contract was completed, is sufficient; it alleging the dryer was constructed, and showing that the claim is for services performed and materials furnished in the construction of a dryer.

*Food furnished contractor for employees and teams as material giving lien on railroad is discussed in note in 15 L. B. A. (N. S.) 509.
REPORTER.

From Washington: JAMES U. CAMPBELL, Judge.

Department 2. Statement by MR. JUSTICE BEAN.

This is a suit by Theo. M. Barr against the World Keepfresh Company to foreclose a mechanic's lien on lots 5 and 6, block 8, Fair View Addition to the City of Hillsboro, Washington County, Oregon, together with the structure erected thereon. The lien was filed by the plaintiff September 26, 1912, for services rendered and materials furnished by him to the defendant in the construction of a dryer, between August 8 and September 11, 1912, as stated in the notice of lien and in the complaint. The claim amounted to \$2,087.37, no part of which has been paid. Plaintiff asked to be allowed \$225, attorney's fees. The defendant's answer consists of a general denial of the allegations of the complaint, a portion of which is based upon information and belief. Upon the trial evidence was introduced showing that about the month of May, 1912, the plaintiff agreed orally with the defendant to construct a drying plant, in the warehouse or dryer of the defendant company, for what the labor and material would be reasonably worth. The plant consisted of two units or furnaces with the attachments, each furnace having 10 apartments or trays for drying fruits and vegetables connected therewith. The plaintiff proceeded to get out the materials to be used in both units. At first only one unit was erected, as the company desired to observe its operation before building the second, and to make such alterations as would be shown to be necessary. Thereafter plaintiff constructed the two units and finished the same in September. The furnaces were built upon a cement floor, and constructed of brick, laid in mortar. The notice of lien

contained a lumping charge, consisting of a single item, as follows:

The World Keepfresh Company, a Corporation, in
Account With Theo. M. Barr, Dr.

To materials furnished and labor performed
in the construction of a fruit dryer or
warehouse\$2,087.37

The trial court rendered a decree in favor of the defendant for the reason that the amount, \$2,087.37, as claimed in the lien notice, comprised nonlienable items. The plaintiff appeals. REVERSED.

For appellant there was a brief over the names of *Mr. Woodson T. Slater* and *Messrs. Jeffrey & Lenon*, with oral arguments by *Mr. Slater* and *Mr. Charles E. Lenon*.

For respondent there was a brief and an oral argument by *Mr. E. E. Heckbert*.

MR. JUSTICE BEAN delivered the opinion of the court.

1. It is the position of defendant:

“That no lien was created in favor of the plaintiff under the lien notice filed by him, the claimant having mingled therein lienable and nonlienable items in a lumping charge, there being no means of ascertaining from the notice itself the amount of nonlienable items, or of segregating the same from the lienable items.”

When the lien notice contains merely a lumping charge of the amount demanded, consisting of both lienable and nonlienable items, and there is no means of ascertaining the latter from the lien notice itself, it has often been held that no lien is acquired, and the court cannot, from oral testimony, separate the items for which a lien is given from those for which no lien can be acquired: *Harrisburg Lbr. Co. v. Washburn*, 29

Or. 150, 164 (44 Pac. 390); *Allen v. Elwert*, 29 Or. 428, 444 (44 Pac. 823, 48 Pac. 54); 2 Jones on Liens, § 1419; *Hughes v. Lansing*, 34 Or. 118, 124 (55 Pac. 95, 75 Am. St. Rep. 574); *Portland Hardwood Floor Co. v. Logging Co.*, 64 Or. 316, 319 (130 Pac. 52); *Stewart v. Spalding*, 71 Or. 310 (141 Pac. 1127). Counsel for plaintiff submitted that the items of board and expenses were a part of the compensation for the labor and materials going to make up the reasonable cost and value thereof and were not, strictly speaking, items for which a lien is claimed. No nonlienable item appears upon the face of the notice; hence it becomes important to determine whether or not the proof shows that nonlienable items were contained in the amount claimed.

2. The controversy is in regard to a memorandum of board and expenses amounting to about \$90 contained in a statement of account referred to by plaintiff while testifying, and filed as an exhibit without objection. It will be noticed from the statement of the case that the claim sued for is the reasonable compensation for both materials furnished and labor performed in the construction of the plant. Upon this question Mr. Barr, the plaintiff, testified to the effect that the statement contained the value of all the labor and materials in the construction of the dryer, and mentioned the main items of sheet iron, brick and lumber, etc.; that the material and labor amounted in full to \$2,087.37. His evidence was not objected to, and was not attempted to be shaken on cross-examination. Another witness, Charles F. Gable, superintendent for the defendant in the construction of the plant, stated that one of the units would cost \$1,000, or two, \$2,000. Allen B. Kirk, general superintendent of the defendant company, testified upon this point that the two units of the plant

cost from \$1,000 to \$1,100 each. Referring to the memorandum of plaintiff, the manager said:

"I imagine the bill is for two machines, \$2,087.37; that is double the cost of one machine."

It appears that he had seen the first one, but not the second. Upon being recalled he testified that the dryer constructed at Willamina cost \$1,100 and resembled those at Hillsboro. In addition to this, defendant introduced in evidence a statement of the cost of the dryer at the former place, which showed the same to be \$1,010.98. It is therefore clearly apparent that there is practically no dispute but that the plant was of the reasonable value of the amount claimed. It is seldom that there is so little difference in the estimates of the parties. In keeping his accounts, Mr. Barr made the memorandum of board and expenses which were paid for as a part of the cost of the labor performed and materials furnished in constructing the dryer, and simply charged as board and expenses. It enhanced the cost of the structure, but was purely the compensation for the labor and materials.

Suppose a man had worked for Mr. Barr upon the dryer in question 50 days for his board, and Barr had paid \$1 per day for his keep, could it successfully be maintained that plaintiff would not be entitled to a lien for the \$50 paid in that manner for the labor performed upon the structure if it was reasonably worth that sum? We think not. Board and expenses, when considered as used in the construction of a building, are nonlienable, but when they are a part of the reasonable compensation paid for the labor and materials, it is otherwise. In *City of Salem v. Lane & Bodley Company*, 189 Ill. 593 (60 N. E. 37, 82 Am. St. Rep. 481), it was held that if the contract for an engine for

an electric plant provided that the sum of \$50 should be added to the contract price of the engine in case the services of an erector were needed to set up the engine, the sum of \$50 for services, "board and expenses" of the erector while setting up the engine would be properly regarded as part of the contract price of the engine for which the lien was allowed. *Lybrandt v. Eberly*, 36 Pa. 347, is authority that if the mechanic engages his hands at a certain sum per diem and their board, he may include in his lien the wages and board of the journeymen; for it is a part of the compensation for his work and labor in the erection of the building.

The question at issue in the case under consideration is the reasonable compensation for the labor performed and materials furnished in the erection of the dryer. The form of bookkeeping or memorandum made by the plaintiff is not important. It is the truth of the allegations that should govern, and not the form of bookkeeping; hence we conclude that there were no nonlienable items contained in the amount claimed in the lien notice.

The second position of the defendant is that the lien statement filed was not a true one within the meaning of Section 7420, L. O. L. This is embraced in the first contention mentioned, of which we have already disposed. The defendant's evidence shows that the amount of the statement filed was the reasonable value.

3. It is next claimed that the complaint is defective in not stating that the labor and material were for use, or were used in the construction of the building, or that plaintiff completed the same, or that 60 days have not elapsed since the completion of the contract. That pleading was not challenged by demurrer or motion, nor was there any objection made to

the introduction of evidence under the allegations thereof. It alleges that the dryer was constructed between August 8 and September 11, 1912, and that the lien was filed on September 24th of the same year. While this is not the exact diction used by counsel for defendant, it amounts to the same thing. While the complaint does not allege in precise language that the contract was completed, it alleges that the dryer was constructed, and it shows that the claim is for services performed and material furnished "in the construction of a dryer." A copy of the lien notice is attached to and made a part of the complaint, and says that the claim is for materials furnished to be used, and which were used, in the construction of the building and for labor performed upon the same. Especially in the absence of any demurrer or motion challenging the sufficiency of the complaint we conclude that it was sufficient: *Matthiesen v. Arata*, 32 Or. 342 (50 Pac. 1015, 67 Am. St. Rep. 535); *Bohn v. Wilson*, 53 Or. 490, 493 (101 Pac. 202).

It was stipulated that the court fix a reasonable amount as attorney's fees for the foreclosure of the lien. Two hundred dollars is allowed as such. The decree of the lower court is therefore reversed, and one will be entered foreclosing the lien for \$2,087.37, for \$200 attorney's fees, and for costs and disbursements as prayed for in the complaint.

REVERSED AND DECREE RENDERED.

MR. JUSTICE EAKIN, MR. JUSTICE BURNETT and MR. JUSTICE HARRIS concur.

Argued July 2, affirmed July 20, 1915.

BARR v. WORLD KEEPFRESH CO.

(150 Pac. 749.)

Mechanics' Liens—Foreclosure Decree—Sale of Property.

1. The decree in a mechanic's lien foreclosure should provide that the building and necessary ground be sold together, and not that the building be sold first, and then, if necessary, the ground.

From Yamhill: WEBSTER HOLMES, Judge.

Department 2. Statement by MR. JUSTICE BEAN.

This is a suit by Theo. M. Barr against the World Keepfresh Company, a corporation, in which the defendant appeals from a decree of the Circuit Court for Yamhill County in favor of plaintiff, foreclosing a mechanic's lien on block 4, in Kershaw's Addition to Willamina, Oregon, together with the buildings thereon. The claim alleged in the complaint is for labor performed and materials furnished in the construction of a dryer of the reasonable value of \$1,010.98. A copy of the notice of lien filed by plaintiff is attached to and made a part of the complaint.

AFFIRMED.

For appellant there was a brief and an oral argument by *Mr. E. E. Heckbert*.

For respondent there was a brief over the name of *Messrs. Jeffrey & Lenon*, with an oral argument by *Mr. Charles E. Lenon*.

MR. JUSTICE BEAN delivered the opinion of the court.

1. The demand consists of a single item, the materials furnished and labor performed. The case is a

companion to *Barr v. World Keepfresh Co.*, ante, p. 95 (150 Pac. 747), differing but slightly from that and controlled thereby. In this case it is contended that the sum of \$24 was for nonlienable items, consisting of board, lodging and expenses. It is shown by the evidence that the plaintiff, according to his custom, paid the workmen for work done outside of the City of Salem the usual rate *per diem* and \$5 per week additional. The plaintiff had nothing to do with boarding his help. This item and other expenses, such as freight upon material, were simply matters which added to the cost of the labor and material. It is earnestly argued by defendant that the evidence in the case does not support the decree. This position cannot be maintained. To begin with, the answer of the defendant is not, and apparently could not be, a square denial of the claim. It is to the effect that it denies every allegation therein except as admitted. It acknowledges that the plaintiff furnished some materials for a dryer in the town of Willamina. How much was so furnished, or whether less than the above amount, nowhere appears in the answer. Waiving this, however, a careful examination of the evidence shows that the claim is a reasonable amount for the labor performed and materials furnished in the construction of the dryer. Mr. Barr did not personally superintend the erection of the plant, but shipped the material to the place, and his foreman, who was present during the whole time, testified that he received the materials, kept his own time and that of the men. Plaintiff's evidence shows that the amount charged was reasonable. None of this evidence is contradicted. The decree appealed from provides that the building and dryer be sold first, and then, if necessary, block 4, upon which the same is situated, shall be sold. This might work

a hardship upon the defendant. The building and necessary ground should be sold together. With this exception the decree of the lower court is affirmed; plaintiff to recover costs. **AFFIRMED.**

MR. CHIEF JUSTICE MOORE, MR. JUSTICE EAKIN and MR. JUSTICE HARRIS CONCUR.

Argued July 8, affirmed July 20, 1915.

WESTERN OREGON TRUST CO. v. HENDRICKS.

(150 Pac. 753.)

Vendor and Purchaser—Avoidance of Contract—Sufficiency of Evidence—Misrepresentation.

1. In an action to foreclose a mortgage on residence property sold to defendants by the mortgagee, evidence *held* insufficient to show any misrepresentation by the mortgagee in respect to the removal of a barn and of animals in a park zoo near the premises.

Vendor and Purchaser—Performance of Conditions—Acceptance.

2. Under a contract for the sale of property, providing that the vendor at his own expense should improve all the streets with hard surface pavement, the purchaser, who demanded that a pavement should be put in a street up to a declivity, admitting that it was impossible to pave the remainder of the street, after such paving had been done to his satisfaction, could not insist that the vendor do an impracticable or impossible thing.

[As to false statement by vendor of intention to make improvement affecting property sold as fraud sufficient to avoid contract of sale, see note in *Ann. Cas.* 1914B, 862.]

Vendor and Purchaser—Remedies of Purchaser—Avoidance—Burden of Proof—Breach of Conditions.

3. In an action to foreclose a mortgage on the property sold to defendants by the mortgagee, evidence for defendants *held* not to sustain the burden of proving the mortgagee's failure to perform his contract undertaking to lay water-pipes and construct sewers, or his oral agreement to install gas service, or his oral promise of a street-car line to the property within one year from the contract.

Evidence—Parol Evidence to Vary Writing.

4. Where a contract for the sale of land has been reduced to writing and the mutual obligations of the parties specified, the purchaser

cannot vary or alter the written contract by showing contemporaneous parol agreements without alleging and proving that some fraud was practiced upon him to prevent such agreement from being inserted in the written contract.

[As to supplementing contract for sale of realty by proof of collateral oral agreement, see note in *Ann. Cas.* 1914A, 456.]

Vendor and Purchaser—Breach of Conditions—Waiver or Acquiescence.

5. Where purchasers objected to paying interest on their mortgage note until a car line was built to their premises, and the vendor and mortgagee gave them a writing waiving interest until the line was in operation, the purchasers, who thereafter continued to treat the property as their own, would be held to have acquiesced in the settlement offered by the vendor.

From Multnomah: WILLIAM N. GATENS, Judge.

Department 1. Statement by MR. JUSTICE MC-BRIDE.

This is a suit by the Western Oregon Trust Company, a corporation, against E. W. Hendricks and Clara D. Hendricks, to foreclose a mortgage upon lot 2 in block 2, Parkside Addition to Portland, which mortgage is to secure a promissory note for \$2,000 and interest at 6 per cent, given July 10, 1909. Defendants answered, admitting the execution of the mortgage and setting up as a defense that prior to July 10, 1909, plaintiff, being the owner of the land described in the complaint, negotiated for a sale thereof to defendants. The answer then sets up a state of facts which are summarized in defendants' brief as follows:

“(1) Said property is located back of the city park, in which was an animal zoo, also an offensive stable, and certain buffaloes were kept south of Parkside.

“(2) At the time of the negotiations there was neither street-car service, water-mains, nor water supply, nor gas, nor sewer to Parkside; and as an inducement to Hendricks to make the contract of purchase, the plaintiff, through Dorr E. Keasey, represented as follows: ‘That within six months from July,

1909, the use of the said Washington Street City Park for animals would be prohibited and the animals would be removed therefrom, and also that the buffaloes would be removed from the buffalo pen or range, and that within one year from the date of July, 1910, the plaintiff would install or would cause to be installed water-mains, with water service from the City of Portland and with Bull Run water for the use of the residents and for service at the various lots in Parkside; also that within said period of one year gas-mains would be installed and gas would be distributed throughout said mains for the use of inhabitants and residents; also that within the period of one year the said Parkside Addition would be served with and connected with sewer service, and that within the same period of time all the streets in Parkside Addition would be improved and hard-surfaced and that hard-surfaced roadways and concrete sidewalks and cement curbing would be put in place; also that within one year regular street-car service would be installed for Parkside Addition, which would serve the inhabitants and residents thereof and that said line would be constructed and actual car service begun thereon in the period of time named.'

"(3) The company exhibited a certain map or plat, showing Edison Street running from Washington Street on the north and forming the east boundary of Parkside, to the southerly street thereof.

"(4) That the company would make the improvements referred to.

"(5) That thereby Parkside would be made a desirable addition for residence purposes.

"(6) That Hendricks was induced to and did believe the representations; that he had no other means of knowledge concerning their truth, except as made by the plaintiff. Such statements were made by Dorr E. Keasey, with whom Hendricks had had other dealings, and who had the confidence of Hendricks, and that Hendricks relied upon such statements, and Keasey made them to induce Hendricks to rely upon them.

“(7) Believing such representations, the contract of purchase was entered into and was carried out, and the note and mortgage executed.

“(8) At the time of the mortgage Hendricks had already paid \$2,000 cash for said lot.

“(9) After Hendricks purchased the land, he began negotiations for the construction of his dwelling house thereon.

“(10) That the representations and inducements hereinbefore set forth have not been fulfilled, in this: (a) The street-car service was not established as agreed; (b) water-mains and water service were not established as agreed; (c) gas-mains and gas service were not established at all; (d) the barn referred to in the park was not removed as agreed; (e) the wild animals housed in the park have not been removed, but have been continuously lodged and housed in close proximity to the land; (f) the buffaloes have not been removed, but have been penned and caged in the buffalo pen at all times; (g) ‘that the use of said barn for domestic animals and the use of said buffalo pen or range constitute and are a nuisance and danger to the health of any residents or inhabitants who might build their home in Parkside, and that the refuse from said animals is piled in such close proximity to Parkside that offensive, odious and obnoxious smells and odors therefrom spoil the value of said lots 1 and 2, block 2, Parkside, as a residence site; that the barns and the piles of offal from the said animals are infested by a large number of rats and vermin, which further depreciates and destroys the value of said above-described property as a residence place; that the wild animals of various kinds and the fowls which are housed and kept at the west side of Washington Park further depreciate the value of said Parkside as a residence section and destroy the property above described for residence purposes, and that in the early hours of dawn, and early hours of morning, and various hours throughout the day, said animals create a continuous and lasting disturbance and noise; (h) that the said plaintiff has failed,

neglected and refused to cause said Edison Street to be paved throughout its length from Barnes Road to the public road on the south side of said Washington Park, and thereby lots 1 and 2 of block 2, Parkside, are deprived of such pavement which plaintiff said they would have; that the said Edison Street is not fully paved in front of said property in Parkside, but there is a space of approximately 25 feet in front of said property which is not paved at all.'

"(11) Except and but for the representations, and the reliance thereon, Hendricks would not have purchased the lot.

"(12) He was induced to make the contract and pay \$2,000 cash by the wrongful statements and acts of the plaintiff, and was deceived and defrauded thereby.

"(13) The company has failed, neglected and refused to comply with or perform the terms and conditions involved in said statements and representations, etc.; that they were material, etc.

"(14) The failure to carry out the contract has operated as a fraud on these defendants.

"(15) No street-car service was installed to Parkside at the time the answer was filed.

"(16) By reason of the fraud and wrong perpetrated, as alleged, it was offered to deed said property back, 'which is in the same condition now as it was when these answering defendants purchased it, save and except public improvements,' etc., and upon executing the deed Hendricks demanded the return of his \$2,000, with interest at 6 per cent.

"(17) The allegation then continues concerning such representations that each of them was a part and parcel of a general scheme to make Parkside Addition a desirable residential district, and that the fulfillment of the representations would cause added value to the lots.

"(18) 'That at the time said plaintiff made such representations plaintiff did not have any valid or other contract, or any provision, for the removal of the said animals from the said park, or for the aboli-

tion of the buffalo pen at the south of Parkside, nor the installation of street-car service, nor has plaintiff at any time paved all of said Edison Street as hereinbefore described, nor has plaintiff caused Edison Street to be connected with, nor has it placed any means of ingress or egress between said Edison Street as platted to, Barnes Road, and that the representations made by plaintiff were false.'

"(19) That at the time the representations as alleged were made Hendricks requested the company to reduce them to writing; that Keasey assured him they would be carried out, and induced him not to require them to be put in writing, and by reason of his confidence in Keasey he was induced to accept them orally; that such representations were part and parcel of the consideration for the execution of the contract."

The reply alleges in substance that the original contract with defendants was in writing, and denies that any other representations, other than those contained in the writing, were ever made to defendants. The original contract is made an exhibit to the reply, and is as follows:

"Received of E. W. Hendricks the sum of two hundred dollars as a deposit to apply on the purchase of the following described property, situate in the county of Multnomah, State of Oregon, to wit: Lot numbered two (2) in block numbered two (2) in Parkside, according to the duly recorded plat thereof in the office of the county clerk of said Multnomah County, the same being within the corporate limits of the City of Portland. The full purchase price thereof being four thousand dollars, said purchase price to be paid as follows: Eighteen hundred dollars within sixty days from the date hereof, and the remainder, amounting to two thousand dollars, to be paid on or before two years from date hereof, with interest at rate of six per cent per annum, payable annually. An abstract of title covering said property

to be delivered to purchaser within ten days from date hereof. If, as disclosed by the abstract, the title is defective, the purchaser shall be entitled to a return of the deposit mentioned above, without interest, but shall have no other recourse or right of action on account thereof, whatsoever. Upon full payment of the purchase price, the purchaser is to receive a special warranty deed, the covenants of which shall, however, exclude taxes and assessments accruing against the property above described subsequent to the date of this instrument. If the purchaser fails to make the said eighteen hundred dollar payment within the time above specified, time being the essence hereof, the above deposit is to be retained as the consideration for the execution of this instrument and to reimburse the undersigned for the expense incurred in and about said sale, and this receipt shall be null and void. The seller agrees to improve, at its own expense, all the streets in said Parkside with hard-surface pavement, excepting that portion of Kingston Avenue which lies south of the intersection of said Kingston Avenue with Parkside Drive, and lay water-pipes and construct sewers throughout the whole of said Parkside. The deed to said real property to contain a clause restricting the construction of any residence upon said real property so as to cost not less than \$3,500, and that no flats, apartment houses, or barns shall be constructed on said property within twenty years from the 1st day of April, 1909.

"Dated at Portland, Oregon, this 26th day of March, 1909.

"D. E. KEASEY & Co.,
"Agents."

Upon the trial there was a decree for the plaintiff, and defendants appeal.

AFFIRMED.

For appellants there was a brief over the names of *Mr. Isham N. Smith* and *Mr. Edwin V. Littlefield*, with an oral argument by *Mr. Smith*.

For respondents there was a brief over the names of *Messrs. A. E. Clark & M. H. Clark* and *Mr. J. H. Middleton*, with an oral argument by *Mr. M. H. Clark*.

MR. JUSTICE McBRIDE delivered the opinion of the court.

It is clear from the testimony that the menagerie maintained by the city adjoining the property of defendants and the barns and stables adjunctive to it greatly impair the value of plaintiff's property for residential purposes. The public taste in these matters has so changed since the time of Adam and Noah that the howl of coyotes, the roaring of lions, the growling of bears, and the screaming of cougars have become such an annoyance to the average ear that few persons are willing to live in close proximity to an aggregation of such animals; but, while this is true, the evidence shows that defendants were as well aware of the conditions as the agent of plaintiff who sold them the property.

1. The defendant E. W. Hendricks testifies as follows to the representations made to him by plaintiff's agent:

"The first thing, the park was to be changed in there, the animals were to be taken out of the park, within six months. * * The buffalo pens were to be removed, and at the time they were negotiating, in fact, had negotiated, and had the promise of the park board that these animals would be removed positively within six months. * * The barn was to be removed."

Mr. Keasey, the agent of the plaintiff in making the sale, testifies on this subject:

"The matter was discussed regarding the animals in the zoo, and I told him I had the members of the

park board and the mayor on the ground, and they promised me they would do all they could to have at least part of the animals removed, and have the old barn torn down; but I made no definite promise that it would be done at any specified time. I only relied on the city government. * *

"Q. Did you have them up there?

"A. I did.

"Q. Did you tell him truly what you thought?

"A. Yes.

"Q. Did you make any further statement or representation concerning the matter?

"A. I did not. Mr. Hendricks said it seemed unreasonable that they could maintain an old barn; that it was a nuisance. He felt sure it would be removed."

Mr. Bennis, another witness for defendants, testifies, in substance:

That when he bought a neighboring lot Keasey told him that the park board had promised to remove the animals and abate the nuisance in a short time.

"Q. He told you they promised they would do that?

"A. Yes.

"Q. And, based on that, he told you he thought they would be removed within a short time?

"A. Yes.

"Q. And the park board passed a resolution about that time, didn't it?

"A. I think they have it on their minutes that they would abate this."

Further testimony on this line was objected to as not the best evidence. Conceding, without deciding, that a representation that the animals would be removed and the nuisance abated was so material under the circumstances as to avoid the contract in case of failure on the part of the city to remove them, the testimony falls far short of proving the representation alleged. The burden of proof is upon the defendants. They are contradicted by Keasey, while the testimony

of Bennis tends rather to corroborate his statement that he only expressed an opinion derived from facts disclosed to Hendricks at the time the negotiations were in progress. It seems fair to infer from the evidence that Keasey had secured such a promise from the park board, and that both he and Hendricks believed that it would be kept.

2. Stress is laid upon the following provision in the written agreement:

“The seller agrees to improve at its own expense all the streets in said Parkside with hard surface pavement, excepting that portion of Kingston Avenue which lies south of the intersection of said Kingston Avenue with Parkside Drive, and lay water-pipes and construct sewers throughout the whole of said Parkside.”

The evidence tends to show that at a point on Edison Street, approximately 74 feet north of the southwest corner of defendants' property, there is a sharp declivity, breaking off into Washington Street northerly, which it is impracticable to pave, and that when Edison Street was being paved Mr. Hendricks demanded that a pavement should be put in up to this declivity, admitting that it was impracticable to pave the remainder of the street. This was done to his satisfaction, and, having accepted this as performance of the covenant, he cannot now insist that his grantor shall do an impracticable or impossible thing.

3. It is also urged that there was a failure on the part of plaintiff to lay water-pipes and construct sewers in the addition as provided in the written contract; but the testimony shows that these improvements were made long before the commencement of this suit, and before Mr. Hendricks had given any

intimation of an intention to rescind the contract, and it does not appear that he would have been benefited by an earlier installation of these conveniences. The evidence does not bear out defendants' contention that plaintiff orally agreed to install gas service. On the contrary, we think the weight of testimony is to the effect that it declined to make such a promise. The evidence as to whether plaintiff's agent orally promised a street-car line to the addition within one year from the date of the contract is contradictory; the defendants affirming, and plaintiff's agent denying, that such a promise was made. It cannot be said that the defendants, who have the burden of proof in this respect, have shown the existence of such promise by the preponderance of evidence.

4. In any event, where, as in this case, the contract has been reduced to writing and the mutual obligations of the parties specified, defendants cannot vary or alter the written contract by showing contemporaneous parol stipulations not included therein, without alleging and proving that some fraud was practiced upon them to prevent such stipulation from being inserted in the written contract, and there is nothing of that kind in this case: *Looney v. Rankin*, 15 Or. 617 (16 Pac. 660); *Stoddard v. Nelson*, 17 Or. 417 (21 Pac. 456); *Sutherlin v. Bloomer*, 50 Or. 398 (93 Pac. 135). In any event, the parties seem to have settled this contention between themselves long before the suit.

5. Mr. Hendricks objected to paying interest on his note until the car line should have been built, and thereupon the plaintiff gave him a writing waiving interest until it was put in operation; and he has had the benefit of that waiver in the decree here. It further appears that after this writing was given he

continued to treat the property as his own, and joined with other lot owners in the addition in a suit to prevent a city garage from being erected in such a situation as to be a nuisance to the property, and must be held to have acquiesced in the settlement offered by plaintiff.

On the whole case it is evident that plaintiff and defendants relied upon the promise of the park board to remove their collection of nasty, noisy beasts to some other locality, and that if this had been done the other trifling matters urged here by defendants would have been overlooked. That the city continues to offend the ears and nostrils of its citizens with the noise and stench of its collection of beasts is no fault of plaintiff. Defendants were made aware of the conditions before the purchase, and took the chances that the city would refuse to remove the nuisance, deeming such a contingency morally improbable. That their reasonable expectations were not realized is unfortunate, but we have no right to visit the consequences of it upon the plaintiff.

The decree is affirmed.

AFFIRMED.

MR. CHIEF JUSTICE MOORE, MR. JUSTICE BURNETT
and MR. JUSTICE BENSON concur.

Argued May 27, affirmed June 22, rehearing denied July 27, 1915.

STATE v. O'DONNELL.*

(149 Pac. 536.)

Criminal Law—Trial—Misconduct of Prosecutor—Questions.

1. An assignment of error, charging an attempt by the district attorney, to insinuate by his questions that the defendant was a hardened criminal, which was supported by 29 questions asked by him during the trial, 20 of which were not objected to at the time, and practically all of them were competent, and the remaining 9 of which were objected to and the objections sustained, does not show reversible error.

[As to misconduct of attorney at trial and its effect, see note in 100 Am. St. Rep. 690.]

Intoxicating Liquors—Offenses.

2. The home rule amendment (Article XI, Section 2), giving to a city exclusive control of the sale of intoxicating liquors within its corporate limits, subject to the Constitution and criminal laws of the state, does not prevent a prosecution for the violation, within the city of Section 2129, L. O. L., as amended by Laws of 1913, Chapter 74, prohibiting the sale of intoxicating liquor on Sunday.

Intoxicating Liquors—Offenses—Statute—Sale on Sunday.

3. In Section 2129, L. O. L., as amended by Laws of 1913, Chapter 74, providing that no person shall keep open on Sunday a house or room in which intoxicating liquor is kept for sale, nor shall such person sell intoxicating liquor on that day, the words "such person" refer to the first two words, and the statute is not limited to sales by persons who keep a house or room for the sale of intoxicating liquor.

Intoxicating Liquors—Offenses—Sale on Sunday—Evidence.

4. In a prosecution under Section 2129, L. O. L., as amended by Laws of 1913, Chapter 74, prohibiting the sale of liquor on Sunday, evidence as to who kept the place in which the sale was made is immaterial.

Witnesses—Impeachment—Accused as Witness—Character.

5. A defendant, who testifies in her own behalf, can be impeached under the statute by testimony in respect to her moral character the same as any other witness.

[As to impeachment of witness by proving want of chastity, see note in 53 Am. St. Rep. 479.]

Grand Jury—Proceedings—Disclosure—Statements by Defendant.

6. Section 1427, L. O. L. giving the grand jurors immunity from being questioned as to what took place in their room, and Section 1431, prohibiting the disclosure of any fact concerning the indictment while it is not subject to public inspection, which are the only provisions for

*As to prosecution under general liquor law for sale in local option territory, see note in 3 L. R. A. (N. S.) 620. REPORTER.

the secrecy of grand jury proceedings, do not prevent the prosecuting attorney from testifying at the trial as to statements made by defendant in the grand jury room.

Criminal Law—Appeal—Harmless Error—Irrelevant Answer to Question.

7. Where the prosecuting attorney testified to admissions by accused, an answer by him to a question on cross-examination, intended to cast insinuations on him, which was not a direct answer, but was pertinent to the subject and no more prejudicial than the question itself, does not require a reversal.

Criminal Law—New Trial—Grounds—Impeachment of Witness.

8. It was not error to deny a motion for a new trial based on misconduct of the district attorney, which was not in the record, and was not excepted to, and which motion was merely an attempt to impeach the witnesses on particular facts testified to by them.

From Coos: JOHN S. COKE, Judge.

Department 2. Statement by MR. JUSTICE EAKIN.

The defendant, Fannie O'Donnell, was indicted for selling and disposing of intoxicating liquor on Sunday in violation of Section 2129, L. O. L., as amended by Laws of 1913, Chapter 74. The material portion of the statute as amended provides that:

“No person shall keep open on the first day of the week, commonly called Sunday, any house or room in which intoxicating liquor is kept for sale, nor shall such person sell, give or otherwise dispose of any intoxicating liquors on that day.”

Having entered a plea of not guilty, the defendant was tried before a jury and convicted. The defendant appeals to this court.

AFFIRMED. REHEARING DENIED.

For appellant there was a brief over the name of *Messrs. Hoy & Miller*, with an oral argument by *Mr. Harry G. Hoy*.

For the State there was a brief over the names of *Mr. George M. Brown* and *Mr. Lawrence A. Liljeqvist*,

District Attorney, with an oral argument by *Mr. Brown*.

MR. JUSTICE EAKIN delivered the opinion of the court.

1. The first assignment of error is based upon the claim that the district attorney during the examination of witnesses attempted, by insinuation, to convey to the jury the impression that the defendant was a hardened criminal and a dissolute person, and an aggregate of 29 questions scattered through the transcript have been collected and printed in the brief to illustrate the contention of defendant. Twenty of the 29 questions complained of were asked and answered without any objection at all, and it is proper to add that practically all of these 20 questions were competent, and that some of them were made competent by questions asked by counsel for defendant. The remaining 9 questions were objected to, and the objections sustained by the court.

2. The second assignment of error relates to the overruling of an objection of the defendant to evidence tending to show that the sale was within the corporate limits of the City of Empire, the objection being grounded upon the home rule amendment of Section 2 of Article XI of the Constitution as giving to the city exclusive control of all violations of the liquor law. That clause in said amendment has been construed and applied in many cases. It provides within itself that the city shall have exclusive control of the sale of liquors within its corporate limits, subject to the Constitution and criminal laws of the State of Oregon. That clause in the amendment of the Constitution has been frequently held to limit the power

of the city to license and regulate the sale of liquor to cases which are not violative of the state Constitution or criminal laws of the state. Section 2129, *supra*, has been a criminal law of the state ever since this commonwealth was admitted to statehood, and the city has no power to ignore it. The legal question involved in this assignment of error is settled and decided in *State v. Boysen*, 76 Or. 48 (147 Pac. 927).

3. The defendant insists that the words "nor shall such person sell" have reference only to a person who keeps a house or room in which intoxicating liquor is kept for sale. It is plain, however, that "nor shall such person" relates and refers to "no person," the first two words of the statute.

4. Defendant excepted to the ruling of the court excluding evidence on her behalf going to the question of who was conducting the house or place wherein it was claimed the sale of liquor took place. The statute makes any one liable to the penalties therein imposed who sells or gives away such liquors, and it was not important to know who was running the house except as a scheme to involve others who were violating the law.

5. The defendant excepted to the ruling of the court permitting the introduction of testimony in respect to defendant's moral character. This is one of the statutory methods of impeachment of a witness, and we find no ruling thereon that violated her rights in regard thereto: See *Leverich v. Frank*, 6 Or. 212, 213.

6. Error is assigned upon the ruling of the court allowing the district attorney to testify concerning statements made by the defendant in the grand jury room, but we find that the district attorney violated no rule of secrecy in such matters. Sections 1427, 1431, L. O. L., are the only limitations or injunctions as to secrecy in such matters. Section 1427 relates to the

protection of grand jurors, that they cannot be questioned in regard to what took place there or the part they had in it, and Section 1431 prohibits the disclosure of any fact concerning an indictment while it is not subject to public inspection: *State v. Boysen*, 76 Or. 48 (147 Pac. 927). We discover no violation of either of these statutes by the district attorney.

7. Exception is taken to the ruling of the court refusing to strike out an answer of said district attorney to the question of defendant's attorney as follows:

"You claimed, did you not, that some witness—some dissolute witness you had before the grand jury—represented to you and to the grand jury that Mrs. O'Donnell has said you were the father of her little girl, didn't you?"

There seems to have been an effort during the trial of this case to cast insinuations upon the district attorney in order to prejudice the jury against him. Such attempt had no relation to any matter at issue, and was only intended to work upon the feelings of the district attorney or the trial jury. The answer may not have been a direct one to the question asked, but it certainly was pertinent to the subject suggested by the question, and was no more prejudicial to the defendant than the question itself and is not ground for reversal.

8. Error is assigned in the ruling of the court in denying the request for an instructed verdict. Every question involved in that motion is disposed of on this appeal, nor do we find that the court erred in denying defendant's motion for a new trial. This is based principally upon the irregularity of the proceedings of the district attorney, which are not in the record and were not subjects of special exception or objection. It is an effort to retry certain questions upon evidence particularly applicable thereto, but it is not newly dis-

covered evidence, nor is it the result of surprise. It is an attempt to impeach witnesses on particular facts testified to, and is not ground for a new trial.

The judgment is affirmed.

AFFIRMED. REHEARING DENIED.

MR. CHIEF JUSTICE MOORE, MR. JUSTICE BEAN and MR. JUSTICE HARRIS CONCUR.

Argued May 26, affirmed June 22, rehearing denied July 27, 1915.

ROBERTSON v. PORTLAND.

(149 Pac. 545.)

Municipal Corporations—Ordinances—Conformity to Charter—Initiative and Referendum.

1. Under Article IV, Section 1a of the Constitution, reserving to the voters of every municipality the initiative and referendum as to all local and special municipal legislation, and Article XI, Section 2, giving the legal voters of every municipality power to enact and amend their municipal charters, though the charter is now adopted by the same body and through the same procedure as the ordinances, it is still the measure of the city's existence and authority, and no ordinance can be adopted which is not within the express or implied powers granted to the city by its charter.

[As to injunction against void ordinances, see note in 118 Am. St. Rep. 372.]

Constitutional Law—Construction—Provisions Relating to Same Subject.

2. Those sections relate to the same subject matter, and must be construed together.

Municipal Corporations—Local Improvements—Ordinances—Charter Provisions.

3. Under Portland City Charter of 1913, Section 284, which declares that the provisions of the former charter relating to public improvements by local assessments shall remain in force as ordinances only, the effect of which was to repeal them as charter provisions, those provisions are directly dependent on the charter for their validity and are not invalid as not being based on a charter provision authorizing proceedings for such improvements.

From Multnomah: ROBERT G. MORROW, Judge.

In Banc. Statement by MR. JUSTICE HARRIS.

This is a suit by W. E. Robertson and Hannah B. Robertson against the City of Portland, to restrain the paving of Cornell Street, and to prevent the levying of special assessments to pay for the improvement. In 1903 the legislature enacted a charter for the City of Portland: Sp. Laws 1903, p. 3. Acting under the authority of Section 1a of Article IV and Section 2 of Article XI of the state Constitution, reserving to the legal voters of municipalities the right of the initiative and referendum and the power to enact their own charters, the electors of the defendant city at an election held on May 3, 1913, adopted a charter which provides for a commission form of corporate government and became effective July 1, 1913. The 1913 charter is entitled:

“An act to amend an act of the legislative Assembly of the State of Oregon entitled ‘An act to incorporate the City of Portland, Multnomah County, State of Oregon, and to provide a charter therefor, and to repeal all acts or parts of acts in conflict therewith,’ filed in the office of the Secretary of State, January 23, 1903, amended by the legislative assembly of the State of Oregon in 1905, and subsequently amended by the people of the City of Portland, providing for a commission form of government.”

One section of the 1913 charter, known as Section 106 of amendments as adopted May 3, 1913, referred to as Section 345a in a compilation prepared by the auditor prior to May 3, 1913, and now designated as Section 284 of the charter of the City of Portland as revised by the council August 19, 1914, reads:

“That so much of Sections 346 and 347, 348, 349 and 350 as heretofore amended, and of Sections 362 to 421, both inclusive, of the charter of 1903, as is not inconsistent with the provisions of this charter shall remain

in full force and effect as ordinances only subject to repeal and amendment and to the enactment of new legislation by the council in the manner and subject to the restrictions in this section provided upon the subject of improvements of whatever nature to be paid for by local assessment. Such sections shall be known as the Local Improvement Code. No repeal of any portion thereof, amendment thereto nor new legislation upon the subject shall be made by the council except by ordinance which shall be published in full and in its final form in the city official newspaper at least thirty days before its final passage. Notice shall be given in the city official newspaper and by publishing conspicuous advertisements in one or more daily papers published in the City of Portland having a circulation of not less than 1,500 not less than five times, the last of such notices to be published not less than ten days before the final adoption of any such amendment, repeal or new legislation. Upon the adoption of any amendment to or the repeal of any part of such Local Improvement Code or the adoption of any new legislation upon the subject, the whole Local Improvement Code shall be printed in pamphlet form and the auditor shall be furnished with a sufficient number of copies thereof for distribution to all persons inquiring for the same. The council, in the exercise of its general legislative powers, may provide in its discretion for the performance of any public work by or on behalf of the city and for the method of payment thereof, but said Local Improvement Code must provide for the giving of not less than ten days' notice by publication, or by mailing to persons interested, (a) of the intention to make any improvement, and (b) of any proposed assessment against property owners for the same, and the right shall be preserved to the owners of sixty per centum in extent of the property affected by any assessment for a local improvement except for street opening or sewers to defeat the same by remonstrance."

The charter of 1903, by the terms of Section 374, empowers the council to order a street improvement to determine the kind of improvement, and to levy assessments on the land specially benefited. Section 375 requires the city engineer to prepare plans and specifications for the contemplated improvement, and to make estimates of the probable cost of the work to be done; if the council approves the report of the engineer, it then determines the boundaries of the district benefited and to be assessed; the council by resolution declares its purpose to make the improvement and notice of such intention is published. Section 376 provides for the publication of notices; Section 377 affords an opportunity for remonstrances; and Section 378 declares that if no objection or remonstrance, signed by the owners of two thirds of the property affected, is filed within a designated time, the council acquires jurisdiction, and may thereafter by ordinance provide for making the improvement. Section 379 directs the executive board to invite bids for the work, and empowers the board to award the contract. When the work is completed, Section 394 authorizes the auditor to apportion the cost upon the land benefited, and such apportionment is known as a proposed assessment, appropriate notice of which is given; upon the expiration of a fixed time the council is required to consider the proposed assessment together with all objections, and to determine the amount of benefits accruing to the lands assessed, and if the apportionment made by the auditor is not just it shall be corrected by the council; and "the council shall then declare said assessment by ordinance."

In July, 1914, the city commenced proceedings which culminated in awarding a contract for paving a certain portion of Cornell Street, the council having taken all

the steps required by the sections of the 1903 charter already alluded to. The plaintiffs are the owners of land affected by the street improvement, and they have appealed because the decree of the Circuit Court was favorable to the defendant.

AFFIRMED. REHEARING DENIED.

For appellants there was a brief, and an oral argument by *Mr. Ralph R. Duniway*.

For respondent there was a brief over the names of *Mr. Lyman E. Latourette*, *Mr. Richard W. Montague* and *Mr. Walter P. La Roche*, City Attorney, with oral arguments by *Mr. Latourette* and *Mr. Montague*.

MR. JUSTICE HARRIS delivered the opinion of the court.

The plaintiffs contend that the proceedings of the council relating to the Cornell Street improvement were without charter authority. The Robertsons argue that the action of the city council, to be valid, must find its warrant in the municipal charter; that the commission charter contains no provisions for the improvement of streets or for the levying of special assessments; and that therefore the contract for the litigated improvement is void. The defendant asserts that the commission charter contains ample language to support the acts of the council; and the city takes the advanced position that:

“The power of the people to enact legislation relative to local, special, and municipal matters is a constitutional right as to which no restriction has been placed. The people have this right and may exercise the same whether the charter contain any provision authorizing legislation of that character or not.”

1. We agree with plaintiffs that the charter measures the power of the council and disagree with the contention of defendant that the people of a municipality may enact ordinances regardless of whether the charter contains any provision authorizing such legislation. By the terms of Section 1a of Article IV of the state Constitution, the initiative and referendum powers are reserved to the legal voters of every municipality as to all local, special and municipal legislation of any character in or for their respective municipalities. It is also provided by Section 2 of Article XI of the organic law of the state that:

“Corporations may be formed under general laws, but shall not be created by the legislative assembly by special laws. The legislative assembly shall not enact, amend, or repeal any charter or act of incorporation for any municipality, city, or town. The legal voters of every city and town are hereby granted power to enact and amend their municipal charter, subject to the Constitution and criminal laws of the State of Oregon.”

2. These two sections amending the Constitution were adopted by a vote of the people at the same election in 1906, and so far as they relate to the same subject matter must be construed together: *McKenna v. Portland*, 52 Or. 194 (96 Pac. 552); *Branch v. Albee*, 71 Or. 188, 197 (142 Pac. 598).

The constitutional amendments granting to the voters of municipalities the power to enact and amend their charters and extending the initiative and referendum to municipal legislation, did not do away with the necessity of organic law for a city government. A charter is now essential to municipal existence to the same extent as before the adoption of the amendments. The very language employed in Section 2 of Article

XI contemplates the necessity of a charter because the legal voters are given the power to enact and amend their charters. Waiving the question as to whether it can affect charters by general laws, the legislative assembly cannot now enact, amend or repeal any single act of incorporation. The power to amend a charter is lodged with the electors of the state as a whole, and is also conferred upon the legal voters of the municipality, but is found in no other place. When they amended the Constitution the sovereign people of the commonwealth in effect declared that all the powers properly belonging to municipal government are at all times made available by a continuous offer to each city; that the legal voters of each municipal corporation may exercise all those available powers or take hold of only a part of them; and that the extent of the powers accepted, assumed, and exercised by the electors is made known, measured and determined by the charter. If the electors of a municipality choose to do all things that may lawfully be done they must manifest that choice by their charter, and if they are contented with the right to exercise less than the whole power their decision is likewise written in the charter.

When the legislature passed a special law amending a charter it was deemed to be a special grant of power, and if the voters of the entire state enact special legislation affecting a city charter it would receive a like construction. The people of any municipality can now do that which the legislative assembly can no longer do, but at one time could do. The legal voters of a municipality, when acting under the initiative, may pass an ordinance, and they possess like authority to enact a charter; it is true that in both instances the procedure may be the same and the creators of the ordinance are identical with the makers of the charter.

It is clear, however, that a charter must actually exist now the same as before the constitutional amendment, else the language of the Constitution would have been quite different. A charter being essential to municipal life it necessarily follows that the instrument must exist for the same purposes and to the same extent as formerly; and an ordinance, whether enacted by the legal voters of the city or passed by the council, must be referable to a power embraced by the charter. The charter of a city is to its citizens and officers the measure of their authority over persons and property: *Southwestern Telegraph & Telephone Co. v. City of Dallas*, 104 Tex. 114 (134 S. W. 321). As said by Mr. Justice BURNETT in *Kalich v. Knapp*, 73 Or. 558 (145 Pac. 22, 28):

“It is beyond dispute that the council cannot lawfully exceed its legislative authority defined and limited by the charter under which it acts.”

It is hornbook law that municipal corporations have no powers except such as are granted in express words by their charters, or such as are necessarily implied from those granted, or those essential to the declared objects and purposes of the corporations: *Corvallis v. Carlile*, 10 Or. 139 (45 Am. Rep. 134); *Beers v. Dalles City*, 16 Or. 334 (18 Pac. 835); *Pacific University v. Johnson*, 47 Or. 448 (84 Pac. 704); *McDonald v. Lane*, 49 Or. 530 (90 Pac. 181); *Naylor v. McColloch*, 54 Or. 305 (103 Pac. 68); *Mutual Irr. Co. v. Baker*, 58 Or. 306 (110 Pac. 392, 113 Pac. 9); *Rosa v. Bandon*, 71 Or. 510 (142 Pac. 339).

3. Having determined that the charter must be broad enough to include the action of the council, the next step in the inquiry is to ascertain whether the charter adopted May 3, 1913, and effective July 1st of that year, authorizes the street improvement which was ordered

by the council in 1914. It must be conceded that the proceedings now complained of would have been valid if they had occurred prior to July 1, 1913, because the charter of 1903 furnished the requisite authority. It will be remembered that the provisions contained in the 1903 charter relating to street improvements and special assessments are by the terms of Section 284 of the 1913 or commission charter declared to remain in full force and effect as ordinances only. In *State ex rel. v. Portland*, 65 Or. 273, 285 (133 Pac. 62), this court said that the effect of the clause in the revision "is to repeal the provisions as parts of the charter and to re-enact them as ordinances. The people have already repealed them so far as they stood as charter provisions, but have re-enacted them as ordinances." The sections of the 1903 charter, material to this discussion and continued as ordinances by the present charter, have not been amended or repealed since May 3, 1913, and are not inconsistent with any expressions found in the commission charter. The authority which formerly was incorporated in a charter is now found in ordinances; and the plaintiffs argue that the resolutions and ordinances of the council providing for the Cornell Street improvement and the contemplated special assessments are based upon nothing but ordinances, which in turn lack the support of a charter. We cannot concur in the conclusion reached by the plaintiffs. The one time charter provisions but now ordinances prescribe in detail the procedure to be followed by the council, and the procedure outlined by the ordinances is directly referable to the charter of 1913; the ordinances applicable to all improvements and under which the council acted exist and are effective because and only because the charter of 1913

specifically declares that they do exist; the connection between the ordinances and the charter is direct; the charter is fully as broad as the ordinances, and they are comprehended in their entirety by the charter because that instrument continues them as written in the charter of 1903. Instead of containing appropriate language permitting the legal voters or the council to pass the ordinances involved in this discussion the charter has by the force of its own terms enacted the ordinances. The charter is the authority for the ordinances as well as for all the proceedings contemplated or required by them; the ordinances owe their existence to the charter and they are vitalized by it and nothing else. The council possessed the requisite authority for making the street improvement and for exacting the assessments complained of. The decision of this case does not require any expression of opinion as to whether the council is properly and sufficiently empowered to enact new legislation prescribing a different procedure for street improvements and special assessments.

The decree of the Circuit Court is affirmed.

AFFIRMED. REHEARING DENIED.

MR. JUSTICE BURNETT did not sit.

Argued May 26, affirmed June 22, rehearing denied July 27, 1915.

PORTLAND v. BLUE.

(149 Pac. 548.)

Municipal Corporations — Improvements — Charter Provisions — Ordinances.

1. Under Portland City Charter of 1913, Section 284, which declared that the provisions of the former charter relating to public improvements by local assessments, including Sections 400 and 401 thereof, authorizing the adoption of a reassessing ordinance and providing for appeal from such reassessment, should remain in force as ordinances only, those sections remain in force by the terms of the charter, and are not void as no longer based on the authority contained in the charter.

Municipal Corporations — Improvements — Charter Provisions — Reassessment of Benefit — Change in Charter.

2. Reassessment proceedings under those sections, an appeal from which was pending in the Circuit Court when that charter was adopted, were not interrupted by the change from charter provisions to ordinances, and that appeal can thereafter be determined by the court the same as if the charter had contained an express authorization to enact such ordinances and they had been enacted by the council or voters.

From Multnomah: GEORGE N. DAVIS, Judge.

In Banc. Statement by MR. JUSTICE HARRIS.

This is a proceeding by the City of Portland against H. R. Blue for the reassessment of lands for the construction of a sewer.

In 1903 the legislature enacted a charter for the City of Portland: Sp. Laws 1903, p. 3. The charter provides by the terms of Section 400 that whenever an assessment for the construction of a sewer has been set aside, or when the council shall be in doubt as to the validity of such assessment, the council may by ordinance make a reassessment upon the land benefited by the improvement; the council is required to declare by resolution the district that will be benefited by the improvement for which the reassessment is made, and to direct the auditor or the city engineer to prepare a

preliminary assessment; upon the passage of such resolution the auditor shall give notice that such assessment is on file in his office and the time at which the council will hear and consider objections; the auditor is also required to mail a notice to each property owner; the property owners are afforded an opportunity to file objections to such assessment; after hearing and determining all objections the council is empowered to pass the reassessment ordinance, whereupon the assessment shall be entered in the docket of city liens and is enforced and collected in the same manner as other assessments for local improvements.

So far as material herein Section 401 reads thus:

“Any person who has filed objections to such new assessment or reassessment, which have not been satisfied by the amendments made by the council, may appeal to the Circuit Court of the State of Oregon for the County of Multnomah from the assessment against any property owned by him, or in which he has an interest. An appeal shall be taken by serving notice of appeal, within twenty days from the passage of the ordinance adopting the assessments as amended, upon the mayor, auditor, or city attorney, and filing the same, with the proof of service, together with an undertaking with one or more sureties, who shall have the qualifications of sureties on appeal from the Circuit Court to the Supreme Court, and, if excepted to, shall justify in like manner, conditioned that such appellant will pay all costs and disbursements that may be awarded against him on appeal, not exceeding \$500. * * Any number of persons may join in such appeal, and the only question to be determined therein shall be the amount of special benefits equitably to be assessed against the property of each person joining in said appeal. The jury shall view the property assessed, and its verdict shall be a final and conclusive determination of the question. * * The city shall be considered the plaintiff, and such appeal shall be con-

ducted and be heard and determined, as far as practicable, in the same manner as an action at law."

In 1906 the state Constitution was so amended as to grant to the legal voters of municipalities the power to enact and amend their charters: Section 2, Article XI. And at the same time a further amendment was adopted extending the initiative and referendum to municipal legislation: Section 1a, Article IV. Acting under the authority of the constitutional amendments, the electors of Portland, on May 3, 1913, adopted an amended charter providing for a commission form of municipal government, which became effective July 1 of that year. The new or amended charter declares in Section 284 that so much of "Sections 362 to 421, inclusive, of the charter of 1903 as is not inconsistent with the provisions of this charter shall remain in full force and effect as ordinances only subject to repeal and amendment, and to the enactment of new legislation by the council in the manner and subject to the restrictions in this section provided upon the subject of improvements of whatever nature to be paid for by local assessment." Considered as ordinances, Sections 400 and 401 have not been amended or repealed since May 3, 1913.

The common council of the City of Portland on November 11, 1911, passed an ordinance reassessing the property of defendants for the construction of a system of sewers known as Riverside sewer district, and on the following day the ordinance was signed by the mayor. The defendants on December 1, 1911, appealed from the assessment ordinance by filing a notice of appeal together with an undertaking in the Circuit Court. After a trial in the Circuit Court a judgment was entered sustaining the assessment, but thereafter a motion for a new trial was granted. The

cause came on for trial a second time on March 30, 1914, and a judgment was again obtained confirming the reassessment, whereupon the defendants appealed.

AFFIRMED. REHEARING DENIED.

For appellant there was a brief and an oral argument by *Mr. Ralph R. Duniway*.

For respondent there was a brief over the names of *Mr. Lyman E. Latourette*, *Mr. Richard W. Montague* and *Mr. Walter P. La Roche*, City Attorney, with oral arguments by *Mr. Latourette* and *Mr. Montague*.

MR. JUSTICE HARRIS delivered the opinion of the court.

Immediately after counsel made their opening statements to the jury at the second trial the defendants objected to the introduction of any evidence and moved that the cause be dismissed, for the reason that Sections 400 and 401 of the charter of the City of Portland, under which the appeal had been taken, and by virtue of which the trial was being held, were repealed by the adoption of the commission charter on May 3, 1913, and there was no longer any statute under which to proceed in the trial of that case. It will be borne in mind that the reassessment was made by the council, and the appeal taken by the defendants, while the 1903 charter was in effect and before the adoption of the 1913 charter, and that the final trial in the Circuit Court occurred in 1914.

The contention of defendants proceeds upon the theory that an ordinance to be valid must be referable to a power expressed in the charter; that Sections 400 and 401 in their character as ordinances are not supported by any power contained in the 1913 charter per-

mitting a reassessment, and that therefore the ordinances are void because without charter authority; that the appeal from the reassessment ordinance while Section 401 existed as a part of the city charter had the effect of suspending, staying and vacating the reassessment ordinance, thus leaving the assessment proceeding incomplete and ineffective; that the 1913 charter having repealed the 1903 charter and the former instrument containing no power to reassess, such repeal before a consummation of the assessment proceeding by a trial in the Circuit Court, deprived the court of jurisdiction to proceed, destroyed the right to recover as well as the obligation to pay, and left the assessment proceedings exactly as they would be if the power to reassess had never existed at any time.

1, 2. Applying the rule announced in the kindred case of *Robertson v. Portland*, ante, p. 121 (149 Pac. 545), Sections 400 and 401 have the sanction of charter authority because they are directly referable to the charter of 1913, which instrument by the force of its own terms re-enacts Sections 400 and 401 as ordinances, thus giving to the ordinances not only the requisite authority, but also the express indorsement of a charter. Although Sections 400 and 401 were changed from charter provisions to ordinances, nevertheless, the change was wrought by a charter; and while there was a change in the nature of the sections still the continuity of their existence was not interrupted, and consequently no break occurred in the reassessment proceedings: *Renshaw v. Lane County*, 49 Or. 526 (89 Pac. 147); *State v. McGinnis*, 56 Or. 163 (108 Pac. 132); *Bayless v. Douglas County*, 57 Or. 301 (111 Pac. 384); *State v. Schluer*, 59 Or. 18 (115 Pac. 1057); *Woodburn v. Aplin*, 64 Or. 610 (131 Pac. 516); *Rosa v. Bandon*, 71 Or. 510 (142 Pac. 339). There has

not been any amendment or repeal of Sections 400 and 401 since May 3, 1913, but they are in the exact form in which they appeared when their adoption as ordinances was brought about by the 1913 charter; and having the sanction and support of a charter the reassessment sections, even though they are now ordinances, are effective to the same extent and in the same degree as though the charter had contained in express power couched in appropriate language permitting the enactment of like ordinances, and the council or legal voters had thereafter and in a separate proceeding passed such ordinances. The council had authority to pass a reassessment ordinance before the adoption of the 1913 charter, and that body still has the same right. The power to make local improvements and levy assessments was not destroyed or relinquished when the 1913 charter became effective. The judgment of the Circuit Court was an exact confirmation of the reassessment as made by the council, and the defendants cannot avoid the reassessment.

The judgment is affirmed.

AFFIRMED. REHEARING DENIED.

MR. JUSTICE BURNETT did not sit.

Argued February 15, reversed March 9, rehearing denied July 27, 1915.

LANG v. CAMDEN IRON WORKS.*

(146 Pac. 964.)

Master and Servant—Injury to Servant—Liability—Employers' Liability Act.

1. An action by an employee injured by the fall of a gin pole while on a steel girder of a gas-tank in process of construction over 70 feet above ground, caused by the negligence of the employer in failing to properly fasten the guy ropes and in recklessly moving the gin pole, may be brought under Employers' Liability Act (Laws 1911, p. 16), providing for the protection and safety of employees constructing or repairing buildings, tanks and other structures.

[As to duty of master to servant, see note in 75 Am. St. Rep. 591.]

Master and Servant—Injury to Servant—Employers' Liability Act—Construction—"Negligence."

2. The acts of omission which constitute "negligence" under the Employers' Liability Act are failure to use care in selection and inspection of material, in erection or maintenance of scaffolding or other structure more than 20 feet from the ground, failure to provide a safety rail or other device for protection of employees on such structures, failure to cover dangerous machinery, shafts, or openings, failure to provide a system of signals, failure to use enumerated precautions as to electrical work and contrivances, failure to use every practicable device for the protection of employees in dangerous employments, and failure to use every practicable care and precaution for the safety of employees.

Master and Servant—Injury to Servant—Employers' Liability Act—Construction—"Care and Precaution."

3. The words "every device, care and precaution," in Employers' Liability Act, must be taken in their full sense, except as limited by the context, and the limitation must be construed merely as qualifying the word "device," and the words "care and precaution" apply not only to the safe condition of the machinery considered merely as such, but to the method of its operation.

[As to diligence required where a human life is involved, see note in 77 Am. St. Rep. 26.]

Master and Servant—Injury to Servant—Action Under Employers' Liability Act—Pleadings.

4. A complaint in an action for injuries to an employee on a girder of a gas-tank in process of construction, caused by the fall of a gin pole, which sets forth facts indicating that the work was haz-

*As to the constitutionality, application and effect of the Federal Employers' Liability Act, see note in 47 L. E. A. (N. S.) 38.

ardous, that the machinery was not properly placed, and was improperly fastened, that the agents in charge of the work were negligent in the maintenance of the gin pole and in the manner of moving it, that they did not use every device, care and precaution which it was practicable for them to use to prevent injury, states a cause of action within the Employers' Liability Act.

Master and Servant—Injury to Servant—Defective Appliances—Evidence—Admissibility.

5. Where the complaint in an action for injuries to an employee by the fall of a gin pole did not allege that the pole was in itself an improper device, but alleged negligence in maintaining and operating it, evidence of another and better device was inadmissible.

Evidence—Declarations—Res Gestae.

6. In an action for injuries to an employee by the fall of a gin pole, evidence that just before the accident, and while the gin pole was being used, the foreman in immediate charge of the work directed a teamster occupying a position on the ground immediately at the foot of the structure to move to another place because the pole might fall down on the team, was admissible as a part of the *res gestae*.

Trial—Conduct of Counsel—Reading Statutes to Jury—Action of Court.

7. Error in permitting counsel for plaintiff suing for a personal injury to read to the jury the Employers' Liability Act was not prejudicial, where the court in its charge instructed the jury that the action was brought under the act, and explained it fully.

Damages—Personal Injuries—Permanent Injury—Evidence.

8. Testimony of a physician that in some respects the injury to the arm of plaintiff suing for a personal injury was permanent authorized an instruction on permanency of the injury in determining the damages.

Evidence—Cross-examination of Expert—Personal Injuries.

9. Where a physician testified on direct examination that plaintiff suing for personal injuries would probably have as good an arm as ever, and that the injuries were not permanent, a question on cross-examination whether the physician, aside from the pain and inconvenience, would just as soon that his arm should be in the condition in which plaintiff's arm was, was improper.

Appeal and Error—Harmless Error—Erroneous Admission of Evidence.

10. Where a physician testified on direct examination that plaintiff suing for personal injuries would probably have as good an arm as ever, and that the injuries were not permanent, error in allowing on cross-examination a question answered in the negative as to whether he would, aside from the pain and inconvenience, just as soon have his arm in the condition in which plaintiff's arm then was, was not prejudicial.

Master and Servant—Injury to Servant—Issues—Instructions.

11. Where the complaint in an action for injury to an employee by the fall of a gin pole did not charge that the pole was an improper device, but only charged that its maintenance and operation in a care-

less manner caused the injury, an instruction that the jury might consider evidence of another device or method as a means of throwing light on the question of whether the device used was a sufficient one was outside the issues, and prejudicial.

From Multnomah: THOMAS J. CLEETON, Judge.

Department 1. Statement by MR. JUSTICE McBRIDE.

This is an action by Phillip M. Lang against the Camden Iron Works, a corporation, to recover for personal injuries. That part of the complaint which sets forth the alleged negligent acts and omissions of defendant is as follows:

“That on or about the 26th day of May, 1913, the defendant herein was engaged in the construction of a gas-tank located on the west side of the Willamette River, about a half mile south of the town of Linnton, Oregon; that the said gas-tank, when completed, would approximate 100 feet in height and about 104 feet in diameter, and that the said tank was constructed of steel, circular in form; that there was builded around and about the said circular tank a porch or walk about 35 feet from the ground surrounding the entire structure, and fastened securely to the rim of the tank, and erected upon this was a guard or guide frame constructed of steel or iron columns about 10 or 12 feet apart, placed the one upon the top of the other, bolted or riveted together and held in place by iron girders extending from one of these columns to the other and securely fastened thereto by bolts or rivets, forming an entire framework of steel or iron round and about the said tank, and that the said frame, when completed, would be approximately 100 feet in height and surround the entire tank; * * that on or about the said 26th day of May, 1913, at about 11 o'clock A. M. of the said day, the plaintiff herein, while in the employ of the defendant, and in the discharge of his duty, was assisting in fastening the said columns and girders, and was occupying a position on the top of one of the said girders about 80 feet from the ground; * * that

the defendant, in raising the said columns and girders to the top of the said guard or guide frame, which was being so constructed as aforesaid, carelessly, negligently, and recklessly used a gin pole which was situated upon the top of the said gas-tank, and was about 80 feet in length, to the top of which was attached pulleys and riggings, through which ropes passed, and which formed a rigging by which the said columns and girders were hoisted from the ground to the top of the said guide frame to be placed; * * that the said gin pole was maintained in an upright position on the top of the said gas-tank by means of guy ropes extending from the top of said gin pole to the ground, and that the base or foot of the said gin pole was placed in a shoe about 2 feet wide by 4 feet in length, which was placed upon rollers in order that the said gin pole with the said pulleys and rigging ropes might be changed from one position to another on the top of the said gas-tank in order to raise the said columns and girders to the place where the same might be needed in the construction of the said guard or guide frame; * * that on the said 26th day of May, 1913, the said guy ropes were carelessly and negligently fastened; that the manner in which they were placed in order to secure the said beam in an upright position was unsafe and done in a careless and reckless manner; that the manner in which the gin pole was moved from one place to another was unsafe and carelessly done, and that the handling of the same was done in a careless and reckless manner, and that on account of the unsafe, careless and reckless manner in which the said gin pole was being moved and maintained in position, and operated, and in which the said guy ropes were placed and fastened, caused the said gin pole to fall, and the said rope passing through the pulley on the top, having been made fast to a girder or column, and passing over the top girder of the said guard or guide frame, where the plaintiff herein was engaged at work, caused the said rope to travel with great rapidity over the said girder, and to strike the plaintiff herein upon the right arm, breaking the bones of the said arm, mangling and

crushing the same, which caused this plaintiff great pain, and still causes him great pain, and which said injury is permanent in its character."

All allegations of negligence having been put in issue by the answer, the case was tried, and resulted in a verdict and judgment for plaintiff, from which defendant appeals.

REVERSED. REHEARING DENIED.

For appellant there was a brief over the names of *Mr. Benjamin B. Beekman, Messrs. Joseph & Haney and Mr. Edward B. Watson*, with oral arguments by *Mr. Bert E. Haney and Mr. Beekman*.

For respondent there was a brief with oral arguments by *Mr. Cicero M. Idleman and Mr. L. P. Hewitt*.

MR. JUSTICE McBRIDE delivered the opinion of the court.

1. This case was evidently begun and tried by plaintiff upon the theory that his remedy was under the Employers' Liability Act (Laws 1911, pp. 16, 18), and the contention of defendant here is that the plaintiff has not brought himself within the provisions of the act, either by pleadings or proof. The specific acts of negligence alleged or attempted to be alleged in the complaint may be briefly summarized as follows: (a) The defendant carelessly, negligently and recklessly used a gin pole in raising the columns and girders to the top of the guide frame; (b) that the guy ropes to the gin pole were carelessly and negligently fastened; (c) that the manner in which they were placed in order to secure the pole in an upright position was unsafe; (d) that they were adjusted in a careless and reckless manner; (e) that the manner in which the gin pole was moved from one place to another was careless and reck-

less; (f) that on account of the careless and reckless manner in which the gin pole was being moved and maintained in position and operated, and in which the guy ropes were placed and fastened, the pole fell and injured plaintiff. From the above summary it is apparent that there has not been pleaded any connection between the injury occurring and the fact that a gin pole was used. In other words, it is not charged that a gin pole is in itself an improper device; the cause of the accident as shown in subdivision (f), *supra*, being attributed to the careless and reckless manner in which it was moved and maintained and operated and the negligent manner in which the guy ropes were fastened. The complaint charges that the gin pole fell and plaintiff was injured because of the following negligent acts with respect to it: (1) Maintenance; (2) moving; (3) operation; (4) position of guy ropes; (5) fastening of guy ropes. We will now examine the Employers' Liability Act to ascertain whether these allegations bring plaintiff within it. The title to the act in question is as follows:

“An act providing for the protection and safety of persons engaged in the construction, repairing, alteration, or other work, upon buildings, bridges, viaducts, tanks, stacks and other structures, or engaged in any work upon or about electrical wires, or conductors or poles, or supports, or other electrical appliances or contrivances carrying a dangerous current of electricity; or about any machinery or in any dangerous occupation, and extending and defining the liability of employers in any or all acts of negligence, or for injury or death of their employees, and defining who are the agents of the employer, and declaring what shall not be a defense in actions by employees against employers, and prescribing a penalty for a violation of the law.”

It may be observed that in the Laws of 1911 the words "occupation, and extending and defining the liability of employers in," occurring after the word "dangerous," at the end of line 6 in the title, do not appear; a whole line having been accidentally omitted by the printer. The quotation here is from the original act. The words "about any machinery or in any dangerous occupation, and extending and defining the liability of employers in any and all acts of negligence, or for injury or death of their employees," here employed, are sufficiently broad to include nearly any conceivable case of negligence; and, while the text of the act is perhaps more narrow than the title, it is still broad enough to include most of the injuries suffered by employees where any risk or hazard would seem naturally incident to the employment. Those sections of the act applicable to the case at bar are Sections 1 and 2:

"All owners, contractors, subcontractors, corporations or persons whatsoever, engaged in the construction, repairing, alteration, removal or painting of any building, bridge, viaduct, or other structure, or in the erection or operation of any machinery, or in the manufacture, transmission and use of electricity, or in the manufacture or use of any dangerous appliance or substance, shall see that all metal, wood, rope, glass, rubber, gutta-percha, or other material whatever, shall be carefully selected and inspected and tested so as to detect any defects, and all scaffolding, staging, false work or other temporary structure shall be constructed to bear four times the maximum weight to be sustained by said structure, and such structure shall not at any time be overloaded or overcrowded; and all scaffolding, staging or other structure more than twenty feet from the ground or floor shall be secured from swaying and provided with a strong and efficient safety rail or other contrivance, so as to prevent any person from falling

therefrom, and all dangerous machinery shall be securely covered and protected to the fullest extent that the proper operation of the machinery permits, and all shafts, wells, floor openings and similar places of danger shall be inclosed, and all machinery other than that operated by hand power shall, whenever necessary for the safety of persons employed in or about the same or for the safety of the general public, be provided with a system of communication by means of signals, so that at all times there may be prompt and efficient communication between the employees or other persons and the operator of the motive power, and in the transmission and use of electricity of a dangerous voltage full and complete insulation shall be provided at all points where the public or the employees of the owner, contractor or subcontractor transmitting or using said electricity are liable to come in contact with the wire, and dead wires shall not be mingled with live wires, nor strung upon the same support, and the arms or supports bearing live wires shall be especially designated by a color or other designation which is instantly apparent and live electrical wires carrying a dangerous voltage shall be strung at such distance from the poles or supports as to permit repairmen to freely engage in their work without danger of shock; and generally, all owners, contractors or subcontractors and other persons having charge of, or responsible for, any work involving a risk or danger to the employees or the public shall use every device, care and precaution which it is practicable to use for the protection and safety of life and limb, limited only by the necessity for preserving the efficiency of the structure, machine or other apparatus or device, and without regard to the additional cost of suitable material or safety appliance and devices. * * The manager, superintendent, foreman or other person in charge or control of the construction or works or operation, or any part thereof, shall be held to be the agent of the employer in all suits for damages for death or injury suffered by an employee."

The concluding clause of Section 1 is significant:

“And generally, all owners, contractors or subcontractors and other persons having charge of, or responsible for, any work involving a risk or danger to the employees or to the public, shall use every device, care and precaution which it is practicable to use for the protection and safety of life and limb,” etc.

The situation of plaintiff on the top of one of the steel girders, 71 feet above the ground, was obviously and inherently dangerous; and while he was in this position it was just as obviously the duty of defendant or its agents to take every care and precaution practicable to see that the gin pole and its appliances were so placed, secured and operated as would minimize danger of injury to him. There was evidence tending to show that such care was not used, not only in one, but in several, respects. The ropes, guys, pulleys and fastenings of the gin pole were a part of the machinery and appliances for carrying on the work. They were fully described to the jury, and a model was exhibited on the trial. From all the evidence submitted we think the jury was justified in assuming that, if the agents of defendant had taken reasonable care to see that these ropes were maintained in a proper position and fastened securely, the accident would not have occurred. The testimony tended to show that plaintiff was upon a narrow girder at least 71 feet from the ground, and in a position where he could not protect himself if the gin pole should fall. The base of the gin pole was itself upon an iron floor constituting a compartment of the tank 35 feet from the ground, and its shaft was 80 feet high. It rested in a shoe about 4 feet in length, which was placed upon rollers of iron pipe, and was moved from place to place

by pinch bars as occasion required in the progress of the work. There is no suggestion of any latent defects in the appliances, and there is every reason to believe that by reasonable care and caution in respect to properly placing and fastening the guy ropes the gin pole would not have fallen. Properly braced and handled, it was a safe machine, but one requiring a high degree of care in its management and maintenance. While perhaps its falling was not a circumstance to which the doctrine *res ipsa loquitur* should be applied to its full extent, yet the fact of its falling under the circumstances certainly furnished some evidence that proper precautions had not been used to avert the accident. We think neglect in respect to the matters mentioned brings the case within the spirit and letter of the Employers' Liability Act.

2. At the risk of repetition, and to make plain our view as to the particular acts of omission which constitute negligence under the Employers' Liability Act, they may be enumerated as follows: (a) Failure to use care in selection and inspection of materials; (b) failure to use care in erection or maintenance of scaffolding or other structure more than 20 feet from the ground; (c) failure to provide a safety rail or other device for protection of employees upon such structures; (d) failure to cover dangerous machinery, shafts or openings; (e) failure to provide a system of signals; (f) failure to use certain enumerated precautions in regard to electrical work and contrivances; (g) failure to use every practicable device for the protection of life and limb in all dangerous employments; (h) failure to use every practicable care and precaution for the safety of life and limb.

3. The words "every device, care, and precaution," used in the act, must be taken in their full sense, except

as limited by the context, and this limitation must be construed merely as qualifying the word "device." The words "care and precaution" apply not only to the safe condition of the machinery, considered merely as such, but to the method of its operation, and, if a machine safe in itself becomes a source of injury by reason of the fact that the employer or those representing him fail to use reasonable care in its operation, and thereby an injury is inflicted upon an employee not in control of its operation or management, the injury is within both the letter of the act and the mischief which it was designed to remedy.

4. It is contended that the pleading does not definitely show that it was the intent of the plaintiff to bring his action upon the statute. The complaint is somewhat loosely drawn, but it shows a state of facts which indicates that the work in which plaintiff was engaged was hazardous; that the machinery (guys, ropes, etc.) was not properly placed and was improperly fastened; that the agents in charge of the work were negligent and reckless in the maintenance of the gin pole and incautious in the manner of moving it; that they did not, in the language of the statute, "use every device, care and precaution" which it was practicable for them to use to prevent injury to the plaintiff. Where these matters appear it is not necessary for a plaintiff to expressly declare upon the statute, and this is especially true where the defendant does not demur to the complaint or move to make it more definite and certain, as is the case here: *Cederson v. Oregon R. & N. Co.*, 38 Or. 343 (62 Pac. 637, 63 Pac. 763). With these preliminary observations in mind we will now proceed to consider the specifications of error relied upon by defendant.

5. The first exception relates to the admission by the court of testimony tending to show that a certain other device called an "A" frame was frequently used for the same purposes as the gin pole, which was in use on the work in which plaintiff was engaged. This testimony, if it tended to prove anything, tended to show that another and better device than the gin pole should have been used; and, as there was nothing in the pleadings to indicate that a gin pole was in itself an improper device, the admission of this testimony was error.

The second exception relates to the refusal of the court to strike out the testimony above alluded to, and need not be further considered.

6. The third exception relates to the admission by the court of testimony tending to show that just before the accident, and while the gin pole was being moved, defendant's foreman, who was in immediate charge of the work, directed a teamster whose teams occupied a position on the ground immediately at the foot of the structure to remove them to another place, giving as a reason that the gin pole might fall down on the teams. This was so nearly connected with the principal transaction as to form a part of the *res gestae*, and its admission was not error.

7. The fifth exception relates to the failure of the court to prohibit counsel for plaintiff from reading Section 1 of the Employers' Liability Act to the jury. The reading of the act was probably improper; but, as the court in its charge instructed the jury that this action was brought under that act, and explained it fully to the jury, it does not appear that any injury to defendant resulted from the action objected to. The sixth exception relates to the same matter.

The seventh exception relates to the instruction of the court in relation to the duties of an employer under the liability act. It is practically a summing up of the provisions of the act, and the objection was evidently based upon the theory that the complaint failed to disclose a statutory liability. We find no error in this instruction.

We find no defect in the eighth, ninth, tenth, eleventh, twelfth, thirteenth and fourteenth instructions, objected to by defendant. The objections to them are all based upon the same theory of the law as the seventh instruction mentioned above.

8. The fifteenth exception is to the following instruction:

"If your verdict be for the plaintiff, in estimating the damages you shall take into consideration the nature and extent of the plaintiff's injury, its probable permanency, the pain and suffering which the plaintiff has endured and will endure hereafter, if any, the effect that the injury may have upon the earning power of the plaintiff, the loss of wages which the plaintiff has sustained by reason of the injury complained of, and any results or effects which are shown by the evidence to follow as the direct and proximate result of the injury which the plaintiff has sustained."

The objection to this instruction goes to that portion of it referring to the possible permanency of the injury; the defendant's counsel insisting that there was no evidence that the injury might be permanent. Dr. Walker, a witness for plaintiff, testified positively that in some respects the injury to the arm was permanent, and this testimony was sufficient to authorize the instruction.

9, 10. Upon cross-examination of Dr. Tucker, a witness for defendant, who had testified on direct examination that plaintiff would probably have as good

an arm as ever, and that the injuries were not permanent, plaintiff's counsel, over defendant's objection, asked him this question:

"Then, as I understand you, Doctor, aside from the pain and inconvenience you might suffer, that you would just as soon that your arm was in the condition that his is as to be in the condition you have it now?"

The witness replied: "No, sir; I would not." The court should have sustained the objection to this question; but, as the answer was in line with the doctor's principal testimony, which indicated that plaintiff's arm had not yet entirely recovered, it is difficult to see how it could have prejudiced defendant's case.

11. The court erred in instructing the jury that it might consider evidence of another device or method as a means of throwing light upon the question as to whether the device used was a sufficient one. This was practically saying to the jury that they might compare the "A" frame device mentioned in the testimony with the gin pole mentioned in the complaint, with a view of determining whether a gin pole was a proper device to use in the work. As the complaint does not charge that the gin pole was an improper device, but only that its maintenance and operation in a careless and reckless manner caused the injury, this instruction was wholly outside the issues and highly prejudicial. Under our Constitution the jury is the exclusive judge of the facts, and its findings are not, as a rule, reviewable, but, as we have frequently said, no good verdict can be predicated upon a wrong instruction. The law is the yardstick by which the jury is to measure the testimony, and if the yardstick is too short or too long, the final measurement is likely to be erroneous. In this case the pleadings were somewhat indefinite, and the counsel, in their zeal for their

client, somewhat reckless in bringing doubtful propositions into the case; and, while in most respects the learned circuit judge laid down the law properly, yet in the respect indicated there was error to the manifest injury of defendant.

The judgment will be reversed and a new trial granted.

REVERSED. REHEARING DENIED.

MR. CHIEF JUSTICE MOORE, MR. JUSTICE BURNETT and MR. JUSTICE BENSON concur.

Submitted on briefs June 3, affirmed June 22, rehearing denied July 27, 1915.

STATE v. McPHERSON.

(149 Pac. 1021. See, also, 70 Or. 371, 141 Pac. 1018.)

Larceny—Place of Theft—Question for Jury.

1. In a prosecution for the larceny of a mare, whether the mare was taken in the county alleged held for the jury under the evidence.

[As to animals as subjects of larceny, see note in 47 Am. St. Rep. 765.]

Statutes—Indeterminate Sentence Law—Title—Constitutionality.

2. Laws of 1911, page 172, extending and defining the indeterminate sentence, creating a parole board, and limiting its powers and duties, repealing Sections 1723, 1731, L. O. L., and amending Sections 1592, 1724—1730, which dealt with parole and indeterminate sentences when the matter was in the hands of the Governor, instead of the parole board, is not violative of Article IV, Section 20, of the Constitution, providing that every act shall embrace but one subject, and matters properly connected therewith, which subject shall be expressed in the title, since it is unnecessary to state specifically the subject of an amendment of a section of a statute in the title to the amendment; and, if all the provisions of a statute relate directly or indirectly to the same subject, are naturally connected, and are not foreign to the subject expressed in the title, the statute will not be held unconstitutional.

Criminal Law—Appeal—Harmless Error.

3. In a prosecution for larceny of a mare, testimony of the owner of the mare concerning the man who did his branding in a certain year was wholly immaterial, and its admission over objection was harmless error.

Criminal Law—Harmless Error—Evidence—Admissions.

4. Where the defendant, at the time of the arrest for horse-stealing, made no admissions against his interest, he was not prejudiced by the admission, over objection, of the officer's testimony as to what he had said with reference to another stolen horse.

Criminal Law—Appeal—Objection to Evidence.

5. Where no objection was made or exception taken to the admission of immaterial testimony, error could not be predicated upon its admission.

Witnesses—Impeachment.

6. Where a witness was attempted to be impeached by testimony of another relating to a different time, place and circumstance, from those referred to by the witness, objection to the attempted impeachment was properly sustained.

[As to impeaching witnesses, see note in 14 Am. St. Rep. 157.]

Criminal Law—Harmless Error—Evidence.

7. In a prosecution for larceny, testimony of two witnesses that the defendant was in the state in August and September of a certain year was not prejudicial because such time was subsequent to the date of the larceny, where there was no testimony definitely fixing the time when the crime was committed, and time testified to was prior to the date of the crime given in the indictment.

Criminal Law—Evidence—Admissibility.

8. In a prosecution for larceny, the state could prove admissions the defendant made upon a former trial, although he was not a witness at the present trial.

Criminal Law—Nonsuit.

9. Denial of a motion for new trial is not assignable as error on appeal.

From Crook: WILLIAM L. BRADSHAW, Judge.

In Banc. Statement by MR. JUSTICE EAKIN.

The defendant, John M. McPherson, was jointly indicted with Judd McPherson and Mace Newsham for the larceny of a mare on September 14, 1912, in Crook County, Oregon, and was tried before the other defendants were apprehended. On the trial there were a great many exceptions taken by the defendant, and after a verdict of guilty and judgment thereon, he appealed to this court.

AFFIRMED. REHEARING DENIED.

For appellant there was a brief over the names of *Mr. Enoch B. Dufur* and *Mr. W. P. Myers*.

For the State there was a brief submitted by *Mr. Willard H. Wirtz*, District Attorney, and *Mr. William H. Wilson*.

MR. JUSTICE EAKIN delivered the opinion of the court.

1. The first assignment of error is against the action of the court in disallowing the motion for a directed verdict of not guilty at the close of the state's case. The defendant rested the motion upon the want of evidence to show that the mare was taken in Crook County. There was direct evidence upon this fact, Millican testifying definitely that the mare was taken in that county; that it had been her usual range, with headquarters at defendant's ranch. Although defendant seeks to throw some doubt upon that fact, the only ground therefor is failure of a witness to say that he knew the animal was taken from Crook County. He testifies as to where she ranged in that county, and that when he last saw her she was near his home place. It was a question to be submitted to the jury, and defendant was not entitled to a directed verdict. There was some evidence of the mare having been on the Last Chance Range, which is in Lake County; but the testimony tended to show that, although in gathering the horses from the range they had been gathered at the Last Chance Corral, she had been driven there from the north, that it was not her range, and that there is no proof she had been there before.

2. Defendant excepts to the court's overruling defendant's motion to set aside and vacate the judgment for the reason that the statute providing for the judg-

ment, which was an indeterminate one, was unconstitutional and void. The attack is made upon the statute creating the parole board. Indeterminate sentences of persons to be incarcerated in the penitentiary and the right of the Governor to parole such prisoners were provided by the act of 1905 (Laws 1905, p. 318), to the constitutionality of which there is no objection: Section 1592, L. O. L. In 1911 the legislative assembly passed an act creating a parole board and providing its powers and duties. In this act Sections 1723, 1731, L. O. L., were repealed, and Sections 1592, 1724-1730, were amended. After the creation of the parole board the act deals exclusively with said amendments. Thus, the subject of the statute is the creation of a parole board and provision for its powers and duties. It is not necessary to state specifically the subject of an amendment of a section of the statute in the title. The section amended shows for itself what is the subject of the legislation. In *State v. Shaw*, 22 Or. 287 (29 Pac. 1028), Justice ROBERT S. BEAN interprets Section 20, Article IV, of the Constitution, stating:

“It was intended [by this provision of the Constitution] to prevent the practice, common in legislative bodies not thus restricted, of embracing in the bill matters having no relation to each other, wholly incongruous, and of which the title gives no notice, thus securing the adoption of measures by fraud. * * A reasonable construction permits the single subject to be comprehensive enough for practical purposes, and great latitude is allowed the legislature in stating the subject in the title. It was not designed to require the body of the bill to be a mere repetition of the title. Neither is it intended to prevent including in the bill such means as are reasonably adapted to secure the object indicated in the title. * * ‘To require that every end and means necessary to the accomplishment of this general object should be provided for by separate

act relating to that alone would not only be senseless, but would render legislation impossible.' * * If the title cover the object of the act, the degree of particularity with which it shall be expressed or set out is for the legislature to determine. A disregard of this constitutional provision will be fatal, but the departure must be plain and manifest, and all doubts will be resolved in favor of the law. * * If all the provisions of the law relate directly or indirectly to the same subject, are naturally connected, and are not foreign to the subject expressed in the title, they will not be held unconstitutional as in violation of this clause of the Constitution. * * This clause is not violated by any legislative act having various details properly pertinent and germane to one general object": *Oregon v. Portland General Electric Co.*, 52 Or. 502 (95 Pac. 722, 98 Pac. 160); 36 Cyc. 1022, and note 99; *State v. Brown*, 41 La. Ann. 771 (6 South. 638); *Miller v. Hurford*, 13 Neb. 13 (12 N. W. 832). Therefore exception 2 has no merit.

3. Objection was made to the ruling of the court permitting Millican, the owner of the mare, to testify concerning the man who did his branding in the year 1912, whom the testimony subsequently showed was dead; but this testimony was entirely irrelevant and immaterial, as the colt was not included in the indictment, nor was the state required to prove its ownership.

4. The defendant was arrested in the State of Nevada by the witness Elkins, and Elkins testified that at the time of the arrest he had a warrant for the larceny of the colt, but nothing was said, or any conversation had, with reference to the colt other than that the brand was the brand of Millican; and the question is in regard to the admissions of the defendant at the time of and immediately after his arrest. After testifying that he had arrested the defendant in Nevada upon the warrant issued for the larceny of the colt,

in which the state was attempting to prove statements of the defendant made at that time, defendant's attorney stated:

"We would ask at this time to withdraw from the consideration of the jury all the testimony relative to this colt case and the warrant, for the reason that the witness did not disclose to the defendant that he had a warrant for him upon any other charge, and under the facts and circumstances as disclosed the defendant had a right to believe he was under arrest on this charge."

The statements of the defendant to the witness at any time in regard to the mare or his possession of it was competent, but it could not have been prejudicial to him in any case, for the reason that he made no admissions against his interest. He was therefore not prejudiced, and no objection can be raised now on that point.

5. The sixth assignment is in regard to conversations between Charles Houston and one Staats relative to other horses, but they had no reference to the mare in question, and no objection was made or exception taken to the same.

Exception No. 7 as to when Staats was last in Oregon is of no substantial consequence.

6. Exception 9 relates to an attempt to impeach Charles Houston by the testimony of N. G. Wallace. The questions so propounded to him related to a different time, place and circumstance from those referred to by Houston; and the objection was properly sustained.

7, 8. The tenth exception is taken to the testimony of two witnesses, Mrs. Becker and Mrs. Jones, as to the defendant being in Oregon in August and September of 1912, for the reason that such time was subsequent

to the date of the larceny; but we find no testimony definitely fixing the time when said crime was committed. The testimony of said witnesses, being prior to the date of the crime as mentioned in the indictment, was not prejudicial. The state had a right to prove admissions and statements of the defendant made upon a former trial, and there could be no objection thereto because the defendant did not become a witness at the present trial.

9. The last error assigned was the refusal of the court to grant a new trial. The motion therefore raises no new question not otherwise raised on the appeal and argued and submitted. As said in *Manning v. Portland Shipbuilding Co.*, 52 Or. 101 (96 Pac. 545), a motion to grant a new trial on account of the insufficiency of the evidence is addressed to the discretion of the trial court, and a denial of it is not assignable as error on appeal.

We find no error made upon the trial, and the judgment is affirmed. **AFFIRMED. REHEARING DENIED.**

Argued June 23, reversed July 6, rehearing denied July 27, 1915.

**TOOZE v. WILLAMETTE VALLEY SOUTHERN
RY. CO.***

(150 Pac. 252.)

Navigable Waters—Tide-lands—Right to.

1. An alien platted a large tract of public land abutting on a stream. Many of these parcels were sold to others. The federal government recognized the titles of the purchasers, confirming them. Thereafter the state granted to the upland owners along the stream

*The right of owner of upland to access to water is discussed in extensive notes in 40 L. R. A. 593; 22 L. R. A. (N. S.) 345.

As to right of railroad in street as relating to abutters' rights, see note in 36 L. R. A. (N. S.) 673.

As to effect of street on shore, see notes in 58 L. R. A. 208; 4 L. R. A. (N. S.) 881. REPORTER.

all the property of the state lying between high and low water lines. *Held*, that plaintiff, who owned the fee of the upland, acquired the land between high and low water lines, though the plat provided for a highway between high and low water mark; plaintiff taking such lands subject to the easement of the highway.

[As to title to lands covered by navigable waters, see note in 53 Am. St. Rep. 289.]

Pleading—Departure—What Constitutes.

2. In a suit to enjoin a railroad company from erecting a trestle on land lying between plaintiff's upland property and low-water mark, the complaint asserted that plaintiff was the absolute owner in fee of all the land on which the trestle was to be built. The reply conceded that a street existed between the platted lines and low-water mark of the river. *Held*, that the reply did not constitute a departure preventing recovery; the concession that a street existed merely diminishing relief to which plaintiff was entitled.

Eminent Domain—Streets—Property Right of Abutting Owner.

3. An abutter who owned the fee of a street has a right to use that street to gain access to his property different from the rights of other members of the public, and, having such property right, he cannot be deprived thereof by a railroad company until he receives compensation for his damages as provided by Article I, Section 18 and Article XI, Section 4, of the Constitution.

Municipal Corporations—Obstruction of Streets—Remedy.

4. The right of the owner of the fee of the street to prevent the erection of unlawful structures will be protected by injunction.

From Clackamas: JAMES U. CAMPBELL, Judge.

Department 1. Statement by MR. JUSTICE BURNETT.

This is a suit by Charles T. Tooze against the Willamette Valley Southern Railway Company, a corporation.

The plaintiff says he is the owner of block 12 and lot 7 in block 11 in Oregon City, together with the tenements, hereditaments and appurtenances thereunto belonging. He also avers that the premises constitute the easterly bank of the Willamette River at that point, the ordinary high-water line of which is upon tracts described. The substance of the complaint is that the plaintiff owns the property to low-water line of the navigable stream mentioned, with the attendant privilege of building wharves in front of the

same. The grievance of which he complains is that the defendant railroad company threatens to and is about to construct on the westerly part of his holding, presumably on the space between high and low water mark, a large railway trestle averaging nearly 30 feet in height and permanent in character, which will prevent him from going upon or using the ground thus occupied, cut off his access to the navigable stream, and impair his enjoyment of that portion of the realty.

The defendant alleges that the land was originally platted by Dr. John McLoughlin; in detail traces the title from the United States government to the present time, averring that the ground to be occupied by the trestle mentioned is a public street, and that its right to construct a trestle is based upon an ordinance passed by the city council of Oregon City which it sets forth.

After sundry denials the reply alleges, in substance, that the structure intended will be a permanent obstruction of the street mentioned and of the streets connecting therewith on the north and south of the plaintiff's block, and will impair plaintiff's rights in the streets as a public highway. The Circuit Court, after its hearing, decreed:

"That the plaintiff is not entitled to any of the relief prayed for in his complaint. The right, however, is hereby reserved upon a proper and reasonable showing to enjoin the operation of steam locomotives over the railroad to be laid upon that portion of Water Street described in the answer."

From this determination of the issue the plaintiff appealed. REVERSED. REHEARING DENIED.

For appellant there was a brief with oral arguments by *Mr. A. S. Dresser* and *Mr. H. A. Webster*.

For respondent there was a brief over the names of *Mr. O. D. Eby* and *Messrs. Clark, Skulason & Clark*, with oral arguments by *Mr. Eby* and *Mr. A. E. Clark*.

MR. JUSTICE BURNETT delivered the opinion of the court.

It appears from the record and is a matter of general history of the state that Dr. John McLoughlin, a British subject, settled upon what is known as the Oregon City claim prior to the passage of the act of September 27, 1850, commonly known as the "Donation Law." While he occupied that claim, which includes all the premises involved herein, he platted a portion of it into lots, blocks, alleys and streets. On account of his nationality he was not qualified to take under the donation law. Congress, however, confirmed to his purchasers the titles which he undertook to convey, and patents were accordingly issued by the general government describing each grant by the plat.

1. It appears that the high-water line of the Willamette River is upon the western part of the platted premises here in question, and that Water Street is entirely upon the space between high and low water mark. After the admission of the state into the Union by the legislation of 1874 and 1876, described by Mr. Justice BEAN in *Pacific Elevator Co. v. Portland*, 65 Or. 349 (133 Pac. 72, 46 L. R. A. (N. S.) 363), the state granted to upland owners along the Willamette River all the property of the state in land lying between ordinary high and low water lines on the Willamette River. This grant, of course, was subject to the previous action of the general government in recognizing Dr. McLoughlin's plat. It seems plain that the congressional action on this subject and the conduct of the government authorities in pursuance thereof amounted

to an adoption of the McLoughlin plat, with the consequent dedication to the public of the streets delineated thereon. The plaintiff has become the owner in fee of the block and land mentioned by mesne conveyances from the grantees of the government. By virtue of the grant from the state he became the owner of the space included between high and low water mark in front of the municipal subdivision mentioned, subject, indeed, to the use thereof as a street, as portrayed upon the McLoughlin map.

2. The principal objection pressed upon us at the argument against plaintiff's claim is that he must utterly fail in his contention because in his complaint he asserts himself to be the absolute owner in fee of all the property, not only that included within the block lines, but also that to the west of the same to low-water mark of the river; while in his reply he practically concedes that a street exists between the plat lines and low-water mark of the river. The position of the defendant is that the plaintiff must recover on the strength of his complaint, in which pleading alone must his cause of action be stated, and that the reply is a shifting of his ground, or, in other words, a departure. We do not so consider the pleadings. The plaintiff describes a situation upon which the court may draw the conclusion as to his rights. While he may have failed to prove the allegations of his complaint to the utmost limit, yet he has established a substantial portion of them calling for relief according to the prayer of the bill. It is analogous to a case where a plaintiff might sue upon a claim of \$1,000 for services rendered and would be able to prove only \$500 worth. The relief claimed here is the same in both instances, notwithstanding the defendant's assertion that one cause

of suit is stated in the complaint and another in the reply. The defendant does not appear to have been misled in any manner by the pleadings of the plaintiff.

3, 4. The latter occupies the attitude of a land owner complaining of a threatened trespass upon his rights appurtenant to his holding. His title to the shore of the river between high and low water mark by virtue of the state legislation mentioned has been repeatedly recognized as valid in such cases as *Pacific Elevator Co. v. Portland*, 65 Or. 349 (133 Pac. 72, 46 L. R. A. (N. S.) 363), and the authorities cited in that exhaustive opinion. Considering the matter thoroughly, we conclude that the property on which the defendant intends to construct its trestle is a street. The public has an easement there for the right of passage as in all other streets. The fee of the land is in the plaintiff. Different from other members of the public, he has a right to use that street to gain access to his other property mentioned. It is at least an appurtenance mentioned in his complaint. It is a valuable right of which he cannot be deprived by the power of eminent domain until his damages are first constitutionally determined: Article I, Section 18, Article XI, Section 4, of the Constitution; *McQuaid v. Portland & Vancouver Ry. Co.*, 18 Or. 237 (22 Pac. 899, 40 Am. & Eng. Ry. Cas. 308). Injunction will lie to prevent the erection of a permanent structure in a street materially impeding its use as a street: *Bernard v. Willamette Box & Lumber Co.*, 64 Or. 223 (129 Pac. 1039); *Willamette Iron Works v. Oregon R. & N. Co.*, 26 Or. 224 (37 Pac. 1016, 46 Am. St. Rep. 620, 29 L. R. A. 88). The authority granted by the ordinance of the common council of Oregon City protects the company from the consequences of violating public rights in the street, but it cannot and does not affect private rights con-

nected therewith: *Sandstrom v. Oregon W. R. & N. Co.*, 75 Or. 159 (146 Pac. 803). It cannot be admitted that any institution possessing the right of eminent domain can invade private rights and property without first regularly proceeding to assess the damages and either paying or securing the same under the provisions of our state Constitution. It is urged that the plaintiff does not make any present use of the street worth naming. It may be true that his rights there and the enjoyment of the same are small, but they belong to him and are his as much as the most important piece of property. He is as much entitled to the protection of his small rights as the plaintiffs in *Willamette Iron Works v. Oregon R. & N. Co.*, 26 Or. 224 (37 Pac. 1016, 46 Am. St. Rep. 620, 29 L. R. A. 88), and *Pacific Elevator Co. v. Portland*, 65 Or. 349 (133 Pac. 72, 46 L. R. A. (N. S.) 363). It may be that a jury would give the plaintiff small damages if he were made a defendant at the suit of the defendant here in an action to condemn the right of way on the street in front of his premises. With that, however, we have no concern. It is plain that the defendant is about to interfere seriously with the plaintiff's enjoyment of the land over which it intends to construct its railway, although the same may be a street in which he holds the ultimate fee subject to the public easement therein.

The decree of the Circuit Court is reversed, and the cause is remanded for further proceedings not inconsistent with this opinion.

REVERSED. REHEARING DENIED.

MR. CHIEF JUSTICE MOORE, MR. JUSTICE MCBRIDE and MR. JUSTICE BENSON concur.

Argued June 23, reversed July 6, rehearing denied July 27, 1915.

GRIFFITH v. WILLAMETTE VALLEY SOUTHERN RY. CO.

(150 Pac. 254.)

From Clackamas: JAMES U. CAMPBELL, Judge.

This is a suit by George E. Griffith against the Willamette Valley Southern Railway Company, a corporation, in which a decree was rendered in favor of defendant, and plaintiff appeals.

REVERSED. REHEARING DENIED.

For appellant there was a brief over the name of *Messrs. C. D. and D. C. Latourette*, with an oral argument by *Mr. Charles D. Latourette*.

For respondent there was a brief over the names of *Mr. O. D. Eby* and *Messrs. Clarke, Skulason & Clark*, with oral arguments by *Mr. Eby* and *Mr. A. E. Clark*.

Department 1. MR. JUSTICE BURNETT delivered the opinion of the court.

The issues in this case are substantially the same as in *Tooze v. Willamette Valley Southern Ry. Co.*, ante, p. 157 (150 Pac. 252). Based upon the doctrine of the opinion in that case, the decree of the Circuit Court is reversed and one here entered remanding the cause to that court for further proceedings not inconsistent with the principles laid down in the opinion rendered in the *Tooze Case*.

REVERSED. REHEARING DENIED.

MR. CHIEF JUSTICE MOORE, MR. JUSTICE MCBRIDE and MR. JUSTICE BENSON concur.

Argued June 9, modified July 6, rehearing denied July 27, 1915.

McNIEL v. HOLMES.*

(150 Pac. 255.)

Vendor and Purchaser—Fraud—Evidence.

1. In an action to set aside real estate transactions between physician and patient, evidence *held* to show that complainant was induced to enter into the transaction by the fraudulent representations of defendant.

Principal and Agent—Fraud—Physician—Loss to Plaintiff.

2. Where a physician represents to his patient that he can get some property for her which would be a good investment, and on being made agent of the patient sells his own property to her, the transaction may be rescinded though no loss resulted.

[As to whether a physician's undue influence over a patient is to be presumed, see notes in 33 Am. Rep. 736; 55 Am. Rep. 482.]

Vendor and Purchaser—Fraud—Change of Position.

3. Though a patient, buying land of her physician on the fraudulent representation that it is not his land, does not disaffirm with energetic promptness, after discovery of the fraud, she may rescind; the position of the physician not having changed.

Appeal and Error—Objections to Decree—Cross-appeal.

4. An appellee, not taking a cross-appeal, is presumably satisfied with the decree as rendered by the trial court.

Joint Adventures—Action Between Parties—Relief Awarded.

5. Where a physician represents that he will put in \$2,000 for a \$4,000 purchase of property, if his patient put in the other \$2,000, and the physician buys the property, but mortgages it for his share and takes the title in his name, conveyance of an undivided one-half will be decreed the patient, without prejudice to any rights she may have on account of damage by reason of the mortgage.

[As to carelessness as a bar to relief from fraud, see note in 32 Am. St. Rep. 384.]

Costs—Appeal—Plaintiff not Appealing.

6. Where a decree in favor of plaintiff awards to defendant an amount for taxes paid in excess of that due him, and plaintiff does not appeal, the judgment will be modified, but without costs of the appeal to either party.

From Multnomah: THOMAS J. CLEETON, Judge.

*The effect of a misstatement as to title to real property is discussed in notes in 28 L. E. A. (N. S.) 202; 39 L. E. A. (N. S.) 1142.

As to waiver of purchaser's right to rescind for fraud, see note in 30 L. E. A. (N. S.) 872.

Department 2. Statement by MR. JUSTICE HARRIS.

This is a suit by Sarah L. McNiel against Edwin C. Holmes, in which the plaintiff seeks to annul two real estate transactions, and to recover the moneys paid on account of the lands. The properties involved are known as the Seror Park or Rockwood Tract and the Union Avenue lots. The discordant stories of the litigants are told in the pleadings. The complaint alleges that the plaintiff, being threatened with blindness, sought and obtained the professional services of the defendant, who is a practicing physician; that the parties hereto sustained the relation of physician and patient from the spring of 1910 to the spring of 1913; that, while he was acting as her physician, and with the intent to defraud her, the defendant represented to plaintiff "that he knew of a certain parcel of land which could be bought for \$3,000 and which was worth that sum, and which would prove a profitable investment for the plaintiff, and advised her to purchase said parcel of land, and as a further inducement, defendant fraudulently informed plaintiff that he would purchase said property himself if he had the means; that said defendant at that time owned this said parcel of land, which fact was fraudulently concealed from plaintiff"; that by reason of the false representations the plaintiff entered into an agreement to purchase certain land in Seror Park. The complaint further shows that under the terms of the written contract the defendant agrees to sell, and the plaintiff promises to pay \$3,000 for the land; that the sum of \$1,200 was paid on June 15, 1910, the date of the agreement, and that additional payments were made to the defendant as follows: Three hundred dollars and \$65 on November 9, 1910; \$750 and \$65.62 on September

28, 1911, and \$600 on September 25, 1912. The second transaction involves property which is referred to as the Union Avenue lots. The complaint avers that while defendant was treating plaintiff's eyes he advised her that she could make a profitable investment by intrusting him with the sum of \$2,000 to purchase the Union Avenue property; that it was agreed that plaintiff would contribute \$2,000, and that defendant would invest an equal amount in the land, and that defendant would manage the property, collect the rents, sell the land and divide the proceeds; that plaintiff relied upon the false representations made by defendant, and paid him the sum of \$2,000; that defendant did not make any payment of his own money, but took title in his own name; that defendant refused to account to plaintiff or make any conveyance to plaintiff, except that he gave to her a writing as follows:

"This is to certify that Miss Sarah McNeil has one-half interest in the sale of property 1270 and 1272 Union Avenue North. Same being held in name of Edwin C. Holmes for convenience. Said Dr. Holmes to look after renting, selling, insurance, taxes; and when in his judgment he deems best to sell same and make a settlement with Miss Sarah McNiel.

"Portland, Oregon, Sept. 28th, 1911.

"[Signed] EDWIN C. HOLMES."

The complaint concludes with a prayer for the rescission of both real estate transactions and for a judgment for the moneys paid to defendant. By his answer the defendant denies the charge of fraud, and affirmatively avers that plaintiff expressed a desire to purchase real estate as an investment, and requested defendant to assist her in finding such investment; that he told her that he owned the Seror Park Tract, which he would sell to her for \$3,000; that plaintiff in-

spected the land, signed the written contract, entered into possession, and made the payments mentioned in the complaint. The answer also contains a narration of the defendant's version of the agreement concerning the Union Avenue lots. He asserts that during the early part of the year 1911 the plaintiff requested him to assist her in securing an investment in Portland, Oregon; that, acting upon her request, and after making inquiries, he ascertained that the Union Avenue lots could be purchased for \$4,000; "that plaintiff had for investment at said time the sum of \$2,000; that thereupon an agreement was entered into by and between plaintiff and defendant, by the terms of which defendant purchased in his own name, but in trust for plaintiff, as hereinafter set forth, the property described in said second cause of suit, for the sum of \$4,000, which sum said property was at that time reasonably worth, for \$2,000 cash, and \$2,000 to be secured by mortgage thereon; that it was then and there agreed, by and between plaintiff and defendant, that plaintiff should take said property in his own name and give said mortgage in his own name, but that said transaction should be in trust for plaintiff; that defendant should manage and handle said property as the agent for plaintiff, receive whatever rents and profits might result therefrom, and should sell the same whenever in his judgment the same could be sold for a reasonable profit, and, after paying the said mortgage, the original investment of plaintiff therein, and other expenses, and liens which might exist against said property, defendant should retain one half of the net profits thereof as his compensation aforesaid and services therein, all of which plaintiff then and there well knew and agreed to. Defendant

advanced for plaintiff the sum of \$2,000, for the reason that plaintiff's money had been loaned and invested, and she was collecting the same from time to time, and plaintiff paid defendant thereon the sum of \$2,000 at different times." The story of the transactions as told by the defendant was denied by the reply. A trial in the Circuit Court resulted in a decree which cancels the contract, dated June 15, 1910, concerning the Seror Park Tract, awards plaintiff a judgment for \$2,978.60, with interest, directs the defendant to satisfy the \$2,000 mortgage on the Union Avenue property, and then to deed to plaintiff an undivided one-half interest in the land, and that plaintiff pay to the defendant \$233.37, being one half of the money advanced by the latter for taxes, costs, and charges for the Union Avenue property. The defendant appealed from the decree, but the plaintiff did not appeal from any part of the adjudication. MODIFIED. REHEARING DENIED.

For appellant there was a brief over the names of *Mr. Joel N. Percy* and *Messrs. Wintler & Mendenhall*, with an oral argument by *Mr. Percy*.

For respondent there was a brief over the names of *Messrs. Sullivan & Mannix* and *Mr. Henry M. Esterly*, with an oral argument by *Mr. Ramond A. Sullivan*.

MR. JUSTICE HARRIS delivered the opinion of the court.

1. The plaintiff was suffering from an impairment of her vision, and had moved to Portland with the hope that a change of residence would improve the condition of her eyes. She had consulted with an oculist at her former place of residence, who gave her no encouragement, and she seemed to be in danger of be-

coming blind. After arriving in Portland she consulted with defendant, and the relation of physician and patient existed from March, 1910, until May, 1913, When the plaintiff first interviewed the defendant she was, in the language of defendant, "a nervous, fretful woman at that time." By the exercise of his professional skill the defendant succeeded in bringing about a decided improvement in plaintiff's condition, and because of the success achieved by the physician the patient quite naturally reposed implicit confidence in the defendant.

The version of plaintiff is at variance with the one narrated by defendant. No good purpose is served by recounting all the evidence, and it will suffice merely to say that a careful reading and analysis of all the evidence leads to the conclusion that the narrative given by the plaintiff relates the history of the transactions. Miss McNiel was without friends or relatives in Portland. She had about \$4,500 invested in first mortgages in Bridgeport, Connecticut, and about \$1,500 invested in Pomona, California. The defendant was informed of the financial condition of plaintiff. During a period of 13 years her financial affairs had been managed for her by a Mr. Shaw, who resides in the east. She had no knowledge of the values of property, and did not inspect the Seror Park or Rockwood Tract before signing the contract. She told the defendant that she wanted her eyes to get well as soon as possible, so that she could obtain work and earn back some of the money that she had been obliged to expend, whereupon he represented to her that he had made \$50,000 in real estate in Portland in eight years, and "he said a better way to do than to try to get work and earn money was to buy real estate." Miss McNiel testified that she requested the defendant to advise

her when " he had some good buy that he knew was good," and he told her that—

"he knew of a first-class buy he could not possibly take, he had gone over in detail all his business, and he could not possibly arrange to take it, but I could have that buy."

Miss McNiel further testified:

"He told me he had done everything he could, and he could not possibly arrange to take it, and I said I would be glad to take it. I told him when I would have my first payment, which would be about the middle of June, and I asked him how he could hold so valuable a buy as that was until I could get this money. I said, 'Surely as good a buy as that will be taken up, you can't hold it.' I said, 'I shall have no money whatever to put into that until the 1st of June.' He said, 'By the payment of a small sum of money I can hold that lot for you.' I saw him a few days later, and I asked him if he had been able to hold that lot for me, and he said he had, and he spoke about that from time to time, and I went to him and told him when I would have my first money, and I think I showed him letters from my agent; I know I did a little later, because I took them to him, and he read when I would have my first mortgage note. My first mortgage note was to mature the 15th of June, and it came a little sooner than that, and I made my first payment on the Rockwood property the 15th of June, and he gave me the paper you have there."

The defendant represented that he had made a small payment to the owners in order to hold the property. The circumstance of the name of the defendant appearing in the contract as the seller is explained by Miss McNiel, who testified that:

"When he gave me that property it looked as if he owned the property; his name appeared on it, and his wife's name appeared on it; and he said because he

had made the payment to hold it, it looked as though it belonged to him, but the payment he made was just the same as though he owned the property when it was passed on to me. He told me that it was just the same as though he owned it."

2. The relationship existing between the plaintiff and defendant presents a twofold aspect: One party was both a physician and agent, while the other was the patient and principal. The physician pretended to comply with the request and became the agent of the patient. The Seror Park Tract was represented to the plaintiff as the property of a third person, when in fact it was owned by the agent and physician. The defendant could not be both seller and agent, unless acting with full knowledge and consent of the plaintiff. The principal had the right to repudiate the contract upon learning the truth, without regard to whether the transaction resulted in a loss: 31 Cyc. 1433. It makes no difference that the plaintiff was not injured: *Friesenhahn v. Bushnell*, 47 Minn. 443; *Mills v. Goodsell*, 5 Conn. 475 (13 Am. Dec. 90); 31 Cyc. 1440.

3. The conceded and unquestioned rule is that a defrauded party must not delay in repudiating a contract which has been induced by the fraud of another; and, although the plaintiff did not disaffirm with energetic promptness, nevertheless under all the surroundings of the case she did act with sufficient vigilance to entitle her to a cancellation of the contract for the Seror Park Tract. The defendant was advising her from time to time and his situation was no different at the time of the commencement of this suit than it was at the very moment when plaintiff first learned of facts which would have prompted immediate action by a person more experienced in business affairs. The

contract signed June 15, 1910, should be canceled, and plaintiff is entitled to a judgment for the amounts paid on the contract, with interest at 6 per cent per annum from the date of the several payments, less the sum of \$60, received by plaintiff.

4, 5. Having learned that the Union Avenue property could be purchased for \$4,000, the plaintiff and defendant each agreed to contribute \$2,000 on the price and "own it share and share alike." The plaintiff advanced \$2,000 to the defendant, who in turn paid it to the seller; the defendant, without the knowledge of the plaintiff, took the title in his own name and mortgaged the land to secure \$2,000, which he borrowed for the purpose of paying the balance of the purchase price. The plaintiff did not appeal from any part of the decree or judgment, and presumably is satisfied with the conclusions reached by the trial court: *McCoy v. Crossfield*, 54 Or. 591 (104 Pac. 423); *Flinn v. Vaughn*, 55 Or. 373 (106 Pac. 642). The defendant ought to do that which he agreed to do, and he will be required to convey to plaintiff an undivided one-half interest in the Union Avenue property by executing a proper conveyance within 10 days after the mandate is filed in the Circuit Court, otherwise the decree shall operate as a sufficient conveyance. The defendant had no right to mortgage the interest of plaintiff in the land, but there is nothing to prevent him from encumbering his own undivided interest. If the plaintiff is damaged or injured by reason of the mortgage given by defendant, she may avail herself of any appropriate remedy, and this decree shall not prejudice such remedy.

6. The trial court directed plaintiff to pay to defendant \$233.37, which sum was found to be one half

of the aggregate amount advanced by the defendant for taxes, costs and charges on account of the Union Avenue property. The amount awarded by the decree appealed from is in excess of the sum the defendant is actually entitled to, but the defendant alone appealed and it is necessary to modify the decree appealed from; hence under the circumstances we think it fair that neither party have judgment for costs or disbursements in this court. The plaintiff, however, is not obliged to pay to defendant the sum of \$233.37 unless the defendant satisfies the mortgage so far as the encumbrance affects the undivided interest owned by plaintiff; and, if the mortgage is not paid by defendant, the sum of \$233.37 shall be credited on any damage or injury suffered by plaintiff. It is ordered that the decree be modified so as to conform with this opinion. MODIFIED. REHEARING DENIED.

MR. CHIEF JUSTICE MOORE, MR. JUSTICE EAKIN and
MR. JUSTICE BEAN concur.

Argued June 29, affirmed July 27, 1915.

TOMPKINS v. PORTLAND RY., L. & P. CO.

(150 Pac. 758.)

Carriers—Injuries to Passengers—Negligence—Evidence—Instructions.

1. Where, in an action for injuries to a street-car passenger, the evidence was conflicting on the issues whether the passenger attempted to board the car while standing and was thrown off by a sudden jerk of the car, or whether she attempted to board it while in motion, the court should charge that before the passenger could recover, she must show that she intended to board the car, gave notice thereof to the carmen, or that, in the exercise of reasonable care, they knew that she intended to board it, and if the carmen did not know that she intended to board it, there could be no recovery.

Carriers—Street Railroads—Carriage of Passengers—Care Required.

2. The stopping of a street-car at a place where passengers are usually received is an invitation to the public to board the car, and the invitation continues while the car remains standing, but the starting of the car is a withdrawal of the invitation, and during the time of the invitation the carmen must keep a look-out for persons seeking to take passage thereon.

[Liability of street-car company for injury to passenger by starting car before passenger is seated, see note in *Ann. Cas.* 1912D, 582.]

Trial—Instructions—Refusal of Instructions Covered by Charge Given.

3. Where, in an action for injuries to a street-car passenger, the court charged that the passenger was not required to signal the carmen if she was present at a stopping place when the car stopped, and the carmen knew, or in the exercise of reasonable care should have known, that she was there, intending to board the car, for that constituted an invitation to the public to enter the car, and one desiring to board a car and intending to avail himself of the invitation must put himself reasonably in a situation where it is either known to the carmen that he intends to board the car or in the exercise of reasonable care would be known, refusal of a charge that before the passenger could recover it was necessary to show that she intended to board the car and gave notice to the carmen so that they would know, or in the exercise of reasonable care should have known, that she intended to board the car was not erroneous.

Trial—Instructions—Refusal of Instructions Covered by Charge Given.

4. Where, in an action for injuries to a street-car passenger while attempting to board a car, the court charged that if the passenger attempted to board in the usual way the standing car, and while so doing the carmen, without paying attention to her safety, started the car, causing the injury, she could recover, but if she attempted to board a moving car and by reason thereof was injured, there could be no recovery, refusal to charge that if the car stopped to receive passengers and remained standing for a sufficient length of time to permit all appearing to the conductor, in the exercise of due care, to desire to take passage thereon to do so, and if at the time the conductor gave the signal to proceed the passenger was not in such a position that it was apparent to the conductor that she desired to become a passenger, there was no actionable negligence, was not erroneous.

Appeal and Error—Improper Argument of Counsel—Effect.

5. Where the main issue in the case involved the right of plaintiff to recover for a personal injury, and that issue was fairly submitted to the jury, and the manner of conducting the trial and the amount of the verdict did not indicate that the amount was increased by any improper remarks of plaintiff's counsel, the improper remarks were not reversible error.

[As to instruction to jury to pay no attention to remarks of counsel as reversible error, see note in *Ann. Cas.* 1912C, 817.]

From Multnomah: JOHN P. KAVANAUGH, Judge.

Department 2. Statement by MR. JUSTICE BEAN.

This is an action by Anna Tompkins against the Portland Railway, Light & Power Company, a corporation, to recover damages on account of personal injuries alleged to have been sustained by plaintiff in attempting to board a street-car of the defendant at First and Morrison Streets in the City of Portland, Oregon, on July 15, 1913. The cause was tried before the court and jury, and a verdict rendered in favor of the plaintiff for \$3,100. From a judgment thereon defendant appeals. The complaint alleges that on the date mentioned plaintiff, desiring to become a passenger on one of the defendant's street-cars, waited at the intersection of First and Morrison Streets until one of its trains, consisting of two cars, arrived at that point and stopped there to receive passengers; that the plaintiff, being ready and willing to pay her fare, approached the car which was standing at the crossing, and attempted to board the same, and that while the plaintiff was attempting to do so, the car was caused by the defendant's servants in charge thereof to move forward suddenly with great force, whereby the plaintiff was thrown to the ground, caused to fall between the cars of said train, and thereby injured.

After denying all the allegations of the complaint except the operation of a street-car system within the City of Portland, the answer alleges affirmatively: (1) That after the car had stopped at the street intersection in question and had received several passengers, it was lawfully and carefully started on its journey, and after it had proceeded a short distance beyond the street intersection, the plaintiff negligently ran from the side of the street and attempted to board the train while the same was in motion,

whereby she received the injuries, if any, described in the complaint; (2) that the plaintiff knew her act was dangerous, and that it was impossible to stop the train in time to avoid an accident; and (3) that the accident was caused, not by the negligence of the defendant's servants in charge of its street-car, but by the negligence of the plaintiff. The plaintiff introduced evidence tending to support the allegations of her complaint, and particularly tending to show, by her own evidence and that of her witnesses, that the car was standing at the usual stopping place when plaintiff attempted to board it, and that the bell for the starting of the car was given after she had taken hold of the handrail of the car and had stepped on the step. The testimony of Mrs. Loewig illustrates the evidence on behalf of the plaintiff, which we will quote in part as follows:

"I seen this lady here, stepping out with her daughter, got hold of the car, and had one foot up, and took one hand on the handle on the car and held it tight, and had one foot up and was going to get on. And as she was just in that position the conductor gave the ring to go."

The defendant introduced evidence to controvert that of plaintiff, and tending to show that the plaintiff attempted to board the car while the same was in motion, after it had stopped and started again and gone some distance. The testimony of witness Neville was typical of that of defendant's witnesses. She said that plaintiff traveled about 20 feet after the car started before reaching it. They all agree that she had not presented herself at the car or near it, and had not left the curb to approach the car when the start was made.

AFFIRMED.

For appellant there was a brief over the names of *Mr. T. S. Robinson* and *Messrs. Griffith, Leiter & Allen*, with an oral argument by *Mr. Harrison Allen*.

For respondent there was a brief and an oral argument by *Mr. Arthur I. Moulton*.

MR. JUSTICE BEAN delivered the opinion of the court.

At the close of the evidence the court was requested by the defendant to give certain instructions the refusal of which is the basis for various assignments of error.

1. Assignment No. VIII embodies the following requested charge:

“Gentlemen of the jury, you are instructed that before the plaintiff can recover in this case it is necessary for her to show, by a preponderance of the evidence, that not only did she intend to board the car, but had given some notice to the persons in charge of the car so that the persons in charge of said car knew, or in the exercise of reasonable care should have known, that the person was intending to board said car, and if the persons in charge of said car did not know that the person intended to board the same, and there was nothing that would reasonably lead them to believe that the said party was intending to get upon said car, then the defendant is not liable, and your verdict should be in its favor.”

This requested instruction contains a proper statement of the law concerning the duty of a person about to board a street-car, and as the evidence *pro* and *con* upon this point was conflicting, we think the substance thereof should have been given: *Zurcher v. Portland Ry., L. & P. Co.*, 64 Or. 217, 220 (129 Pac. 126); *Foster v. Seattle Electric Co.*, 35 Wash. 177 (76 Pac. 995);

Gaffney v. St. Paul Ry. Co., 81 Minn. 459 (84 N. W. 304).

2. There is little controversy on the question that the stopping of a street-car at the place where passengers are usually received constitutes an invitation to the public to board the car and become passengers. This invitation continues while the car is standing. The starting of the car is a withdrawal of the invitation. While the latter continues it is the duty of those in charge of the car to use at least reasonable care to see that anyone who attempts to board the car and who puts himself in a position to be readily seen by the person in charge thereof is not injured while boarding the same. During the time the invitation is so extended those in charge of the car are compelled to keep a lookout for persons who may seek to take passage thereon: *Dean v. Third Ave. R. Co.*, 34 App. Div. 220 (54 N. Y. Supp. 490); *Dudley v. Front Street Cable Ry. Co. (C. C.)*, 73 Fed. 128; *Devroe v. Portland Ry., L. & P. Co.*, 64 Or. 547, 556 (131 Pac. 304).

3. Regarding this point, the only question for our determination is whether or not the substance of the requested instruction was contained in the charge given by the court to the jury. Among other instructions, the court gave the following:

“The plaintiff in this case was not obliged to signal the officers of the company if she was present at a stopping place when the car was stopped and they knew, or in the exercise of reasonable care should have known, that she was present there, intending to board the car, because, as I further explained, that constitutes an invitation to the public to enter the car, and if one accepts an invitation and goes upon the running-board and is in the act of entering the car, he is already a passenger of the company. * * One who desires to board a car and intends to avail himself of

an invitation extended should put himself reasonably in a situation where it is either known to the operatives that he is intending to board the car, or in the exercise of reasonable care should have been known."

It appears that the charge given by the court fully explained the necessity of the manner of the plaintiff's giving notice of her intention to board the car, and while not in the exact language requested by counsel, it is to the same purport, and properly directed the minds of the jurors in that regard.

4. Defendant also requested the court to instruct the jury as follows:

"The court instructs the jury that if you believe from the evidence that the defendant's train at the time of the accident stopped for the purpose of receiving such passengers as desired to take passage thereon, and remained standing for a sufficient length of time to permit all those who appeared to the conductor in the exercise of due care to desire to take passage on said train, and that at the time the conductor gave the signal to proceed the plaintiff was not in such a position, with reference to the train of the defendant, that it was apparent to the conductor in the exercise of due care she desired to become a passenger, then I charge you that the act of the conductor in starting the car, if you find that to be a fact, would not be construed as negligence on the part of the company."

Concerning this requested instruction, we are of the same opinion as above stated in regard to the first request: *Gaffney v. St. Paul Ry. Co.*, 81 Minn. 459 (84 N. W. 304); *Pitcher v. People's St. Ry. Co.*, 154 Pa. 560 (26 Atl. 559). For a like reason we turn to the charge given by the court to ascertain whether the request was covered:

"Now, gentlemen, your inquiry will be first whether the company was negligent in the particulars alleged

in the complaint, and if you are satisfied by a preponderance of the evidence that this car came to a full stop at the usual stopping place for receiving passengers, and that while it was so stopped the plaintiff attempted to board the car in the usual and reasonable way, and while so doing the defendant, without paying care or attention to her safety, started that car and she was thereby injured, then the company is guilty of negligence in this case, and your verdict will be for the plaintiff, unless she contributed in some way to that injury herself. * * If you should find from the evidence in this case that after this train had started in motion, after having been stopped and giving a reasonable opportunity to people to board it, it was started again in motion, and this plaintiff ran after the train and attempted to board the car, and by reason thereof was injured, then she will have contributed to the injury in this case; and the law of this state is that there are no degrees of negligence, and when both parties contribute to the injury, when both parties are guilty of negligence contributing to the injury, the law simply leaves the parties where it finds them, and the result of that, of course, is that no recovery will be had in the case. * * ”

The instruction given fully explained the law as set forth in the second requested instruction referred to, and fairly submitted the cause to the jury upon this phase of the case. There was therefore no error in refusing to give the requested instructions in the exact language submitted.

5. During the argument to the jury by counsel for plaintiff, the attorney for the defendant objected to certain remarks which were claimed to refer to the failure of the company to settle the case. There was some dispute between counsel as to the purport of the argument, plaintiff's counsel contending that the remarks were in answer to the argument on the part of defendant to the effect that the action was hastily

brought, and counsel for defendant claiming they referred to a want of offer to compromise. The court, apparently being engaged in the preparation of the charge to the jury, did not hear the remarks, but instructed them to confine themselves to the evidence in their consideration of the case, and if such remarks were made to disregard them. An examination of the record leads us to believe that the main question in the case was the one bearing upon the right of the plaintiff to recover, which was fairly submitted to the jury. The manner of conducting the trial and the amount of the verdict do not indicate that the amount was increased, or that the jurors were influenced by any improper remarks of counsel. The record does not contain the argument. There was no reversible error committed in the rulings of the court.

Finding no error in the record, the judgment of the lower court is affirmed. AFFIRMED.

MR. CHIEF JUSTICE MOORE, MR. JUSTICE EAKIN and MR. JUSTICE HARRIS CONCUR.

Argued July 13, affirmed July 27, 1915.

IDEAL TEA CO. v. SALEM.

(150 Pac. 852.)

Injunction—Restraining Criminal Prosecutions Under Void Legislation—Grounds.

1. Where prosecution under a void regulation relating to a misdemeanor is threatened, and the attempted enforcement of the regulation will deprive plaintiff of a valuable property right, he may sue to enjoin the prosecution.

[As to injunctions against crimes and criminal prosecutions, see note in 35 Am. St. Rep. 670.]

Hawkers and Peddlers—"Peddler"—Who is.

2. One who, by displaying samples, solicits orders for the sale of goods for future delivery, is not, as a general rule, a "peddler."

Statutes—Construction—Meaning of Words.

3. The legislature may adopt reasonable modifications of former definitions of words, so as to make their interpretation conform to modern usage.

Constitutional Law—Privileges and Immunities.

4. Article I, Section 20, of the Constitution, forbidding laws granting to any citizen, or class, privileges or immunities which on the same terms shall not equally belong to all citizens, restricts the legislature, and is a limitation on the common council of a city, and prevents any discrimination against nonresidents of a city in occupation or license taxes.

Licenses—Peddlers—Police Power.

5. An ordinance imposing a license on peddlers having no regular place of business in the city, but who solicit therein orders for the sale and future delivery of tea, coffee, spices, etc., cannot be sustained as an exercise of the police power.

[As to constitutionality of license taxes on drummers, see note in 59 Am. Rep. 267.]

Constitutional Law—Licenses—Privileges and Immunities—"Peddler."

6. An ordinance of a city which imposes on peddlers a license, which defines a "peddler" as a person who, for himself or as the agent of another, goes from house to house selling or offering to sell for future delivery by sample, and which declares that the provisions shall not apply to any merchant or dealer having a regular place of business in the city in taking or soliciting orders for the sale and delivery of his merchandise, conflicts with Article I, Section 20, of the Constitution, prohibiting laws granting to any citizen or class of citizens privileges or immunities which on the same terms shall not equally belong to all citizens; for it imposes a license on nonresident solicitors, but permits merchants of the city to have their employees visit the houses of their customers and take orders for goods without a license.

From Marion: WILLIAM GALLOWAY, Judge.

Department 2. Statement by MR. CHIEF JUSTICE MOORE.

This is a suit by the Ideal Tea Company, a corporation, and C. F. Henshaw against the City of Salem and others, to enjoin the enforcement of a municipal ordinance. The material averments of the complaint are to the effect: That pursuant to subdivision 7 of Section 6 of the charter of the City of Salem, empowering its mayor and aldermen "to license, tax and regulate * * peddlers, sample peddlers * * " (Laws

Or. 1899, p. 921), the common council on November 6, 1911, attempted to enact Ordinance No. 1009, Section 13 of which, as far as important herein, reads:

“Peddlers passing from place to place in the City of Salem, Oregon, on foot and not crying their wares, shall pay a license fee of \$75 for one (1) year; * * \$15 for one (1) month; \$5 for one (1) week and \$1 for one (1) day. * * The term ‘peddler’ as used in this section is defined to mean * * every person who for himself or as agent of another goes from place to place or from house to house selling or offering to sell for future delivery, by sample or catalogue, at retail to individual purchasers who are not dealers in the articles sold. Provided that the provisions of this section shall not apply to any merchant, or dealer having a regular place of business in the City of Salem, Oregon, in taking or soliciting orders for the sale and delivery of his goods, wares or merchandise.”

That the Ideal Tea Company is a corporation engaged in selling tea, coffee, spices, etc., having its principal office in Portland, Oregon, and conducting business outside that city by agents, and C. F. Henshaw is its representative in Salem, Oregon, where he had resided for a long time prior to May 24, 1915, but had no place of business therein. That he was engaged at Salem in taking orders for merchandise, which requests were forwarded to his principal, whereupon the goods desired were sent and delivered to the customers, but he did not carry any wares that he offered for sale. That on May 24, 1915, a verified complaint was filed in the recorder's court of Salem, charging Henshaw with peddling in that city without a license, and being apprehended he was compelled to put up cash bail. That such criminal action has not been tried, but the defendants Charles F. Elgin, city recorder, and J. T. Welch, marshal, are attempting to

prosecute the charge, and the plaintiffs have been prevented from pursuing their business in Salem, to their damage in the sum of \$500. That the ordinance is void, in that it is not uniform in its application to all persons similarly situated, and violates Section 20 of Article I of the organic law of the state, notwithstanding which the defendants are threatening to enforce the provisions of the attempted enactment, to prevent which the plaintiffs have no adequate remedy at law. A demurrer to the complaint, on the ground that it did not state facts sufficient to constitute a cause of suit, was overruled; and, the defendants declining further to plead or answer, the relief prayed for in the complaint was granted, and they appeal.

AFFIRMED.

For appellants there was a brief and an oral argument by *Mr. William H. Trindle*, City Attorney.

For respondents there was a brief and an oral argument by *Mr. George G. Bingham*.

Opinion by MR. CHIEF JUSTICE MOORE.

1. When, under color of void legislation relating to misdemeanors, the prosecution of an alleged offender is threatened, which attempted enactment if enforced would deprive a party of a valuable property right, a court of equity, upon proper application, will intervene, and by injunction prevent the menaced injury: *Sandys v. Williams*, 46 Or. 327 (80 Pac. 642); *Marsden v. Harlocker*, 48 Or. 90 (85 Pac. 328, 120 Am. St. Rep. 786); *Renshaw v. Lane County Court*, 49 Or. 526 (89 Pac. 147); *Hall v. Dunn*, 52 Or. 475 (97 Pac. 811, 25 L. R. A. (N. S.) 193); *Guernsey v. McHaley*, 52 Or. 555 (98 Pac. 158); *Portland Fish Co. v. Benson*, 56 Or.

147 (108 Pac. 122); *Wiley v. Reasoner*, 69 Or. 103 (138 Pac. 250); *Sherod v. Aitchison*, 71 Or. 446 (142 Pac. 351).

2, 3. It is almost universally held that a person who, by displaying samples, solicits orders for the sale of goods for future delivery, is not a "peddler": *Scribner v. Mohr*, 90 Neb. 21 (132 N. W. 734, Ann. Cas. 1912D, 1287, 1293). The legislative assembly of a state may adopt reasonable modifications of former definitions of words, so as to make their interpretation conform to modern usage: *Ex parte Case*, 70 Or. 291 (135 Pac. 881, 141 Pac. 746). Whether the common council of the City of Salem, without an express grant of authority for that purpose, which is not to be found in the organic law of the municipality, can prescribe the meaning of words different from their usual acceptation, would seem to be very doubtful, for in subdivision 5 of Section 6 of the charter authority is given "to prevent and remove nuisances, and to declare by general rules what shall constitute the same," and in subdivision 28 thereof power is conferred "to define what shall constitute vagrancy": *Laws Or. 1899*, pp. 924, 928. But, however this may be, it will be assumed, without deciding the question, that the interpretation of the word "peddler" as given in the ordinance was justified by the charter.

4. The clause of the fundamental law, invoked to defeat Section 13 of the ordinance assailed, reads:

"No law shall be passed granting to any citizen, or class of citizens, privileges or immunities which, upon the same terms, shall not equally belong to all citizens": Article I, Section 20 of the Constitution of Oregon.

This interdiction, though evidently enacted to restrict the legislative assembly, also operates as a limi-

tation upon the common council of a municipality, thereby preventing any discrimination against non-residents in occupation or license taxes: *McQuillin*, Mun. Ord., § 219.

5. The ordinance imposing a license upon peddlers who have no regular place of business in Salem, but who solicit therein orders for the sale and the future delivery of tea, coffee, spices, etc., should not be classed as an exercise of the police power, since it would seem that such business could not injuriously disturb the peace, molest the order, impair the health, violate the morality or annoy the society of the city: *McQuillin*, Mun. Ord., § 260; *People ex rel. v. Jenkins*, 202 N. Y. 53 (94 N. E. 1065, 35 L. R. A. (N. S.) 1079); *Sayre v. Phillips*, 148 Pa. 482, 488 (24 Atl. 76, 33 Am. St. Rep. 842, 16 L. R. A. 49). In the latter case, Mr. Justice WILLIAMS, speaking for the court, says:

“If a statute, or municipal ordinance, is in reality directed only against certain persons who are engaged in a given business, or against certain commodities, in such manner as to discriminate between the persons who are engaged in the same trade or pursuit, in aid of some at the expense of others, such statute or ordinance is not a police, but a trade regulation; and it has no right to shelter itself behind the police power of the state or the municipality.”

See, however, the notes to the case of *State v. Bayer*, 19 L. R. A. (N. S.) 297, 301.

Judge Dillon, in his valuable work on *Municipal Corporations* (5 ed., Section 593), remarks:

“As it would be unreasonable and unjust to make, under the same circumstances, an act done by one person penal, and if done by another not so, ordinances which have this effect cannot be sustained.”

Thus in *Graffy v. City of Rushville*, 107 Ind. 502, 508 (8 N. E. 609, 612, 57 Am. Rep. 128), it was held

that an ordinance requiring a peddler, who was not a resident of the city, and who proposed to sell wares and merchandise which were not grown or manufactured in the county in which the municipality was situated, to procure a license and pay a fee therefor before he could lawfully follow his calling in such city, discriminated against the citizens and products of other communities, and for that reason was void because it violated a clause of the Constitution of Indiana which provided:

“The General Assembly shall not grant to any citizen, or class of citizens, privileges or immunities which, upon the same terms, shall not equally belong to all citizens”: Article I, Section 23.

To the same effect, see, also, *Ex parte Frank*, 52 Cal. 606 (28 Am. Rep. 642); *City of Marshalltown v. Blum*, 58 Iowa, 184 (12 N. W. 266, 43 Am. Rep. 116); *Town of Pacific Junction v. Dyer*, 64 Iowa, 38 (19 N. W. 862); *City of Saginaw v. Circuit Judge*, 106 Mich. 32 (63 N. W. 985); *State ex rel. v. Nolan*, 108 Minn. 170 (122 N. W. 255); *State v. Williams*, 158 N. C. 610 (73 S. E. 1000, 40 L. R. A. (N. S.) 279); *Sayre v. Phillips*, 148 Pa. 482 (24 Atl. 76, 33 Am. St. Rep. 842, 16 L. R. A. 49); *Commonwealth v. Snyder*, 182 Pa. 630 (38 Atl. 356).

“It is true a state,” says Mr. Justice BEAN in *State v. Wright*, 53 Or. 344, 349 (100 Pac. 296, 298, 21 L. R. A. (N. S.) 349), “may impose a tax on, or require a license from, persons engaged in certain callings or trades, without being bound to include all persons or all property that may be legitimately taxed for governmental purposes. * * But the classification must be on some reasonable basis, and the law, when enacted, must apply alike to all engaged in the business or occupation.”

See the notes to this case in 21 L. R. A. (N. S.) 349. To the same effect, see *Moffitt v. City of Pueblo*, 55 Colo. 112 (133 Pac. 754); *Ex parte Case*, 70 Or. 291 (135 Pac. 881, 141 Pac. 746).

6. In the case at bar, the business in which the plaintiffs are engaged is identical with that of some of the merchants of Salem whose employees daily visit the houses of their customers, taking orders for groceries which are later delivered, except that the plaintiffs do not have a regular place of business in that city. Section 13 of the ordinance in question is a clear violation of Section 20 of Article I, of the Constitution of the state, and for that reason is void.

No error was committed in overruling the demurrer. The judgment should therefore be affirmed, and it is so ordered.

AFFIRMED.

MR. JUSTICE EAKIN, MR. JUSTICE BEAN and MR. JUSTICE HARRIS concur.

Argued July 1, reversed July 27, 1915.

STATE v. NAYLOR.*

(150 Pac. 860.)

Lewdness—Evidence—Admissibility.

1. In a prosecution for lewd cohabitation, evidence showing that the conduct of defendant was the subject of criticism in the community was inadmissible, since the question is not whether defendant's conduct was commented upon, but whether it was such as in the mind of a reasonable man would tend to cause scandal, and to induce the belief that the relations between the parties were meretricious.

[As to presumption that character of defendant in criminal case is good, see note in *Ann. Cas.* 1913D, 407.]

*As to waiver of objection to testimony by cross-examination, see note in 33 L. R. A. (N. S.) 103.

REPORTER.

Witnesses—Cross-examination—Effect.

2. Both the direct and the cross-examination must be treated as evidence given for the party calling the witness, in determining its competency on appeal.

Criminal Law—Objections to Evidence—Waiver—Cross-examination.

3. The right to complain of an error committed in the reception of incompetent evidence over seasonable objection is not waived by the mere fact of cross-examination of the witness respecting the matter objected to.

Criminal Law—Appeal—Disposition of Cause—Remand.

4. The court will not determine a criminal cause on appeal, under Article VII, Section 3, of the Constitution, as amended in 1910 (Laws 1911, p. 7), providing that, if the Supreme Court is of the opinion that the judgment should be changed, and that it can determine the judgment that should have been rendered, it shall direct the entry thereof, where the record shows that it will be peculiarly appropriate for the jury to pass upon the issues involved.

From Washington: JAMES A. EAKIN, Judge.

Department 2. Statement by MR. JUSTICE HARRIS.

George F. Naylor was by indictment accused of lewd cohabitation with Rachel Watrous. Nineteen of the 27 witnesses called by the state were permitted, in despite of the objections interposed by defendant, to testify that the conduct and manner of living of George F. Naylor and Rachel Watrous caused talk in the community. The different witnesses described the talk variously. One designated it as "some talk," and others characterized it as "a good deal," or "some," or "a great deal," or "public," or "public talk and public scandal," or "general public gossip," or "general talk."

Manche Langley, a witness for the state, testified over objection that she had heard "from a very great number of people that the children looked a very great deal like Mr. Naylor." Mrs. Barber was asked by the state:

"Do you mean to say that your husband was the only one you heard talk about this subject?"

The court denied the motion of defendant to strike out the answer of the witness, who responded thus:

"If I might explain, I have handled 66 girl cases within the last couple of years since I began this work, and about one out of every six has said to me: 'Why do you pitch into us for? Why don't you clean out the Naylors?'"

REVERSED AND REMANDED.

For appellant there was a brief over the names of *Mr. John J. Fitzgerald*, *Mr. Sam M. Johnson* and *Mr. John F. Logan*, with oral arguments by *Mr. Fitzgerald* and *Mr. Johnson*.

For the State there was a brief over the names of *Mr. Thomas H. Tongue, Jr.*, and *Mr. Edmund B. Tongue*, District Attorney, with an oral argument by *Mr. Thomas H. Tongue, Jr.*

MR. JUSTICE HARRIS delivered the opinion of the court.

1. Since the trial of the instant case in the Circuit Court, the same class of testimony objected to here was held to be inadmissible and prejudicial in *State v. Naylor*, 68 Or. 139 (136 Pac. 889), where Mr. Chief Justice McBRIDE, speaking for the court, says:

"The first error assigned in the appellant's brief was the admission by the court of evidence tending to show that the conduct of defendant and Miss Traver was the subject of comment and criticism in the community. The learned district attorney has cited to us no case, and we have been unable to find one, which holds evidence of this character to be admissible. It is plausibly argued that, as the gist of the offense is its tendency to cause scandal and corrupt public morals, the fact that scandal was caused may be proved as a substantive fact in the case. This would be a dangerous doctrine to ingraft upon the law. The

question is not whether defendant's conduct was commented upon by a few, or even many, people, but was it such as in the mind of a reasonable man would tend to cause scandal and tend to induce the belief in the minds of reasonable people that the relations between the parties were meretricious? Any other rule would substitute hearsay and the opinion of some members of the community for that testimony as to the facts which the law always requires. The authorities support this view: 2 McClain, Crim. Law, § 1135; *Belcher v. State*, 27 Tenn. (8 Humph.) 63; *Buttram v. State*, 44 Tenn. (4 Cold.) 171. The admission of this testimony was error."

It is argued, however, that defendant, by cross-examining the witnesses concerning the evidence objected to, waived the error now complained of. It must be conceded that the conduct of a party may sometimes operate as a waiver and prevent him from taking advantage of what would otherwise be error. In his brief the district attorney relies upon *State v. Finch*, 54 Or. 483 (103 Pac. 505), where the court in a criminal action received in evidence, for the purpose of proving motive, a record showing certain charges preferred by the deceased as prosecutor for the State Bar Association against the defendant, Finch's answer to the charge, his plea, and final judgment suspending him from practice. The evidence was held to be competent; but, even assuming that it had been improperly admitted, the court further ruled that the defendant waived any error by his own conduct in introducing the record of the preliminary hearing of the same charges before the grievance committee of the Bar Association, which was substantially the same as the record introduced by the state. An examination of the proceedings in *State v. Finch* will disclose that the record offered by the defendant was intro-

duced by him through witnesses called for the defendant as a part of his case and clearly it is not an illustration of waiver by cross-examination.

Nor is *Henderson v. Morris*, 5 Or. 24, an authority for the doctrine contended for by the state, because there a witness for the plaintiff was asked on cross-examination whether an account annexed to the complaint was not copied from plaintiff's books and the witness answered that it was. The court held that, if the object of the cross-examiner was to contradict or discredit the witness, it may have been important to the plaintiff to establish the truth of the answer given by the witness, and that therefore the plaintiff's books were made competent for that purpose. The substance of the ruling in *Henderson v. Morris*, 5 Or. 24, is that the defendant by his conduct made the books competent, so that there was no error at all. The holding is not that there was an error which the defendant could not complain of because of a waiver, but the evidence was made competent by the defendant, and consequently in the ultimate analysis there was no error. The defendant by cross-examination may so supplement the direct examination as to supply an omission, as where a witness is not shown on direct examination to possess the qualifications necessary to enable him to testify as an expert, but on cross-examination the requisite qualifications are established. If the evidence elicited on cross-examination should be treated as given for and offered by the party directing the cross-examination rather than for the party calling the witness, then there might possibly be some plausible reason for the conclusion that such cross-examination operates as a waiver.

2. The rule is that both the direct and the cross-examination must be treated as evidence given for the

party calling the witness. As was well said in *Ah Doon v. Smith*, 25 Or. 89 (34 Pac. 1093):

“The testimony of a witness is not alone his evidence as given in chief, but it is the combined result of that given in chief as explained, modified or contradicted by the cross-examination.”

3. There are sporadic cases adhering to the doctrine of waiver, but both reason and the weight of authority support the rule that the right to complain of an error committed in the reception of incompetent evidence over seasonable objection is not waived by the mere fact of the cross-examination of the witness respecting the matter objected to: *Cathey v. Missouri, K. & T. R. Co.*, 104 Tex. 39 (133 S. W. 417, 33 L. R. A. (N. S.) 103); *Galveston, H. & S. A. Ry. Co. v. Kellogg* (Tex. Civ. App.), 172 S. W. 180; *Scarborough v. Blackman*, 108 Ala. 656 (18 South. 735); *Ætna Life Ins. Co. v. Paul*, 23 Ill. App. 611; *United Ry. & Elec. Co. v. Corbin*, 109 Md. 442 (72 Atl. 606); *Barker v. St. Louis, I. M. & S. R. Co.*, 126 Mo. 143 (28 S. W. 866, 47 Am. St. Rep. 646, 26 L. R. A. 843); *Johnston v. Johnston*, 173 Mo. 91 (73 S. W. 202, 96 Am. St. Rep. 486, 61 L. R. A. 106); *Costigan v. Michael Trans. Co.*, 33 Mo. App. 269; *Marsh v. Synder*, 14 Neb. 237 (15 N. W. 341); *Finkelstein v. Keene Elec. R. Co.*, 75 N. H. 303 (73 Atl. 705); *Offitt v. State*, 5 Okl. Cr. 48 (113 Pac. 554); *Laver v. Hotaling*, 115 Cal. 613 (47 Pac. 593); *Id.*, (Cal.), (46 Pac. 1070); *Peacock v. Gleesen*, 117 Iowa, 291 (90 N. W. 610); *Metropolitan N. Bk. v. Commercial S. Bk.*, 104 Iowa, 682 (74 N. W. 26); 2 Ency. Pl. & Pr. 523; 2 R. C. L. 97; Underhill on Ev., § 367.

4. Counsel for the state urge with much force that, notwithstanding the prejudicial errors committed at the *nisi prius* trial, this court should determine the cause on appeal in conformity with Section 3 of Arti-

cle VII of the state Constitution as amended in 1910 (Laws 1911, p. 7), as interpreted by the majority opinion in *Hoag v. Washington-Oregon Corp.*, 75 Or. 588 (147 Pac. 756). An examination of the record shows that it will be peculiarly appropriate for a jury to pass upon the issues involved after hearing competent testimony, with an opportunity to observe the appearance of the witnesses and their manner of testifying. The remaining questions presented by the assignments of error are not likely to arise upon another trial, and for that reason are not now discussed.

The judgment is reversed and the cause is remanded for a new trial. REVERSED AND REMANDED.

MR. CHIEF JUSTICE MOORE, MR. JUSTICE EAKIN and MR. JUSTICE BEAN CONCUR.

Argued July 23, affirmed July 30, 1915.

PEARCE v. ROSEBURG.*

(150 Pac. 855.)

Municipal Corporations—Charter Amendments—Initiative—Election.

1. Article IV, Section 1a, of the Constitution, authorizing cities to provide for the manner of exercising the initiative and referendum powers as to municipal legislation, authorizes a city by ordinance to prescribe the manner in which an election to amend the charter by initiative shall be held.

Municipal Corporations—Amendments of Charters—Elections—Compliance With Ordinance.

2. An ordinance of a city, prescribing the manner for the holding of elections on initiative measures, requires the recorder to give notice of the election, stating therein the measure to be voted on, and requires the council to appoint judges and clerks of election, and to designate voting places, and that on failure so to do, the clerk shall designate the polling places, and the electors present at the time for

*For authorities on the subject of initiative and referendum, see notes in 11 L. R. A. (N. S.) 1092; 33 L. R. A. (N. S.) 969; 50 L. R. A. (N. S.) 198.

opening the polls shall elect the judges and clerks. The council, in ordering an election on an initiative charter amendment, did not appoint judges and clerks, nor designate the polling places, but the clerk in the notice of election designated the polling places, and stated that the qualified electors, at the time for opening the polls, would elect judges and clerks. The notice of election was in conformity with the ordinance, and was published as required thereby. *Held*, that the ordinance was complied with and the election valid.

[As to when change in municipal charter is to be regarded as creating new charter instead of amendment, see note in *Ann. Cas.* 1914D, 1171.]

Municipal Corporations—Initiative Measures—Elections—Validity.

3. Where there was nothing to show that, at a special initiative election in a city to adopt a charter amendment authorizing the creation of indebtedness, any voter not a taxpayer was denied the right to vote, and the evidence showed that 643 votes were cast for the amendment while 78 were cast against it, out of an electorate of over 2,000, the court in determining the validity of the election, would not consider whether Special Laws of 1905, page 36, Section 14, limiting the right to vote to owners of property within the city limits, was in conflict with Article II, Section 2, of the Constitution.

Municipal Corporations—Initiative and Referendum—Statutes—Validity.

4. So much of Laws of 1915, page 187, as attempts to restrict the powers of cities and towns to levy taxes is violative of Article XI, Section 2, of the Constitution giving to cities and towns the power to enact and amend their charters, subject only to the Constitution and criminal laws of the state, for the Constitution prevents legislative interference with purely local and municipal matters, such as city taxation, and extends to the voters of municipalities full power to regulate these subjects.

Municipal Corporations—Public Improvements—Construction of Railroads—Description of Terminus of Railroad.

5. An amendment to the charter of a city, which grants to the council thereof power to contract for the construction of a railroad from the city to a point on the "North Umpqua River at its intersection with the western boundary of the Cascade Range forest reserve," and to issue bonds therefor, sufficiently designates the terminus of the road, though the Cascade Range forest reserve has been, by act of Congress, divided, and that part intersected by the river mentioned is now known as the Umpqua National forest.

Municipal Corporations—Powers and Functions—Contracts—Judicial Supervision.

6. The court, in a suit by a taxpayer of a city to enjoin it from entering into a contract for the construction of a railroad as authorized by the city charter, will not consider whether the contract is a good business proposition.

Appeal and Error—Moot Cases.

7. The power of the court on appeal to dismiss a case as fictitious should not be exercised except where the fictitious character appears

either from the pleadings or from satisfactory evidence, especially where persons, claiming that the suit is fictitious, fail to appear and make the objection and avail themselves of the point in the trial court.

Action—Moot Cases.

8. A suit by a taxpayer to enjoin a city from contracting for the construction and operation of a railroad, as authorized by the charter, and from issuing bonds for the construction thereof, will not be dismissed as fictitious merely because the suit is a friendly one, pursued without rancor, and with the understanding that unnecessary delays will not be permitted.

From Douglas: GEORGE F. SKIPWORTH, Judge.

In Banc. Statement by MR. JUSTICE MCBRIDE.

This is a suit brought by Harry Pearce against the City of Roseburg to enjoin it from entering into a contract with the Roseburg & Eastern Railroad Company for the construction and operation of a railroad running out of said city, and from issuing bonds for the purpose of constructing the same, and generally to prevent the city from in any way participating in the construction or ownership of the proposed road. The facts disclosed by the complaint are as follows: The common council, thinking it desirable that a railway should be built, passed an ordinance submitting an amendment to the city charter to a vote of the people, which ordinance and proposed amendment are as follows:

“An ordinance proposing the enactment of an amendment to the existing municipal charter of the City of Roseburg to authorize the City of Roseburg to construct a railroad from said city to a point on the North Umpqua River where it intersects the western boundary of the Cascade Range forest reserve, and providing for the issuance of bonds in a sum not to exceed three hundred thousand dollars, to provide the means for constructing said railroad, and for leasing and selling said railroad, providing a tax for paying on said bonds and a sinking fund for paying said

bonds at maturity, and submitting the said proposed amendment to the qualified voters of the City of Roseburg at a special election of the City of Roseburg to be held on Thursday, the third day of June, 1915, and declaring an emergency.

“The city of Roseburg does ordain as follows, and be it ordained by the people of the City of Roseburg:

“Section 1. The common council of the City of Roseburg, deeming it expedient, hereby proposes the enactment of the following amendment to the existing charter of said City of Roseburg, to wit: Proposed charter amendment. An act to amend the municipal charter of the City of Roseburg, Oregon, as enacted by the legislative assembly of the State of Oregon, by ‘an act to incorporate the City of Roseburg, and to repeal all acts and parts of acts in conflict therewith to wit: An act entitled “An act entitled an act to incorporate the City of Roseburg, approved October 3, 1872; and an act entitled an act to amend an act entitled an act to incorporate the City of Roseburg, approved October 19, 1880; and an act to amend an act entitled an act to incorporate the City of Roseburg, approved February 23, 1880; also an act amendatory of said act, filed in the office of the Secretary of State, February 19, 1891; and also an act to incorporate the City of Roseburg, and to define the powers thereof, approved February 25, 1895, and to repeal all acts amendatory thereof and in conflict therewith”’ (which act was filed in the office of the Secretary of State on February 22, 1905), and as amended by vote of the people of said city at an election held May 6, 1907, and as amended by vote of the people of said city at the general election held therein on the 5th day of October, 1914. Be it enacted by the people of the City of Roseburg, Oregon: The municipal charter of the City of Roseburg, Oregon, as enacted by the legislative assembly of the State of Oregon, by ‘An act to incorporate the City of Roseburg, and to repeal all acts and parts of acts in conflict therewith, to wit: An act entitled “An act entitled an act to incorporate the City of Roseburg, approved October 3, 1872; and an

act entitled an act to amend an act entitled an act to incorporate the City of Roseburg, approved October 19, 1880; and an act to amend an act entitled an act to incorporate the City of Roseburg, approved February 23, 1889; also an act amendatory of said act filed in the office of the Secretary of State February 19, 1891; and also an act to incorporate the City of Roseburg, and to define the powers thereof, approved February 25, 1895, and to repeal all acts amendatory thereof and in conflict herewith,"' (which act was filed in the office of the Secretary of State on February 22, 1905), and as amended by the vote of the people of said city at an election held May 6, 1907, and as amended by the vote of the people of said city at the general election held therein on the 5th day of October, 1914, shall be and the same hereby is amended by adding thereto sections numbered 156 to 161, inclusive, reading as follows, to wit:

"Section 156. The common council is hereby granted the power, in addition to all the other powers granted by the municipal charter of the City of Roseburg, to construct a standard gauge railroad from the City of Roseburg to a point on the North Umpqua River at its intersection with the western boundary of the Cascade Range forest reserve. Said railroad shall be a common carrier for both freight and passenger service.

"Section 157. For the purpose of raising the necessary funds to construct said railroad the common council is hereby authorized to issue and sell the bonds of the city, bearing five per cent interest per annum, in a sum not to exceed three hundred thousand dollars. Said bonds shall mature and become payable thirty years from the date of their issue and may be paid at any time the interest is payable after ten years from the date said bonds are issued, at the option of the City of Roseburg.

"Section 158. The common council of the city of Roseburg is hereby directed to enter into a contract for the construction of said railroad and may lease the same on such terms and for such periods of time

as to said council may seem for the best interests of the City of Roseburg, provided that such lease shall prescribe that all persons, firms, associations and corporations desiring to transport material of any kind over said railroad shall be granted the same service and the same rates, and that no discrimination as to either rates or service shall be made. The common council is authorized to sell said railroad provided that said sale shall not be made for a less sum than three hundred thousand dollars. The powers herein granted to the common council may be exercised by the people of the City of Roseburg through the initiative.

“Section 159. The common council of the City of Roseburg is hereby directed to levy a tax annually in addition to the tax authorized by Section 33 of said charter, and in addition to all other taxes authorized to be levied by said charter or any of the amendments thereto, sufficient to pay the interest accruing on the bonds authorized by Section 156, and after ten years from the date of the issuance of said bonds, such further levy as may be necessary to provide a sinking fund sufficient in amount to pay said bonds at maturity; and said council may cause said sinking fund to be loaned at interest upon approved security or invested in approved interest bearing securities in the name of the city, pending maturity of said bonds.

“Section 160. The indebtedness authorized by this amendment to the municipal charter of the City of Roseburg is in addition to all indebtedness heretofore authorized and incurred by said City of Roseburg and is not to be considered as affected by any limits of indebtedness in said charter or elsewhere.

“Section 161. All parts of the charter of the City of Roseburg and all ordinances and parts of ordinances of said city in conflict with the provisions of this charter amendment are hereby modified or repealed as the case may require in order that this amendment may be in effect.

“Sec. 2. A special election of the qualified voters of the City of Roseburg is hereby called to be held

on the 3d day of June, 1915, for the purpose of voting on said proposed amendment to the municipal charter of the said City of Roseburg as set out in Section 1 of this ordinance.

"Sec. 3. The title of the proposed amendment to be voted on at said special election shall be as follows, to wit: 'Amendment of Roseburg charter authorizing borrowing three hundred thousand dollars for building railroad to Cascade Range forest reserve.'

"Sec. 4. Inasmuch as it is necessary in order to develop the industries of the city that this ordinance go into immediate effect, and that the development of certain industries depend upon the passage of this ordinance, and that said industries are necessary for the immediate preservation of the peace, health, and safety of the city, an emergency is hereby declared to exist, and this ordinance shall be in effect immediately after its passage and approval by the mayor.

"Passed by the common council April 12, 1915. Approved by the mayor April 12, 1915.

"N. RICE, Mayor.

"Attest: CARL E. WIMBERLY, City Recorder."

Thirty days prior thereto the recorder of the city caused 50 notices to be printed, announcing that said ordinance had passed, each including a copy of the proposed amendment, and thereafter, on the 14th day of May, 1915, caused a copy of said printed notice to be posted in a conspicuous place in each of the four wards of the city, which places are designated and described in the complaint. They are all public and conspicuous places, and the notices remained posted for a period of 10 days immediately preceding said special election. Similar notices were caused to be printed in the "Umpqua Valley News" and "Roseburg Review," both papers being published and having general circulation in the City of Roseburg. Said notices

contained a brief statement of the measure to be voted upon. At said election the judges and clerks were instructed to permit resident taxpayers only to vote, and no votes were cast by any person other than resident taxpayers. The ordinances of the city respecting the conduct of elections and the declaration of the result and the general method of conducting elections are set up substantially in full, but their length prevents them from being reproduced in this statement. The amendment to the charter was adopted by the voters at the election. It does not limit the amount of money to be raised by taxation yearly for the purpose of providing a sinking fund for the payment of the bonds mentioned in said amendment to said charter. The national forest intersected by the North Umpqua River is not now designated by the name of the Cascade Range forest reserve, but is officially known as the Umpqua national forest, which was formerly a part of the Cascade Range forest reserve. The Cascade Range forest reserve as it was formerly designated was divided, and the name of that portion thereof intersected by the North Umpqua River was changed by the act of Congress to Umpqua national forest. At the regular stated meeting of the common council of the City of Roseburg, held at the city hall on Monday the 7th day of June, 1915, a resolution was adopted by appointing a committee directed and empowered to enter into a contract with the Roseburg & Eastern Railroad Company for the purpose of constructing for said city a railroad of standard gauge and construction from the said city in a general easterly direction to the intersection of the North Umpqua River with the western boundary of the Umpqua national forest. The said common council intends to and will, unless restrained by an order of this court,

issue the bonds of said city as provided in said amendment to the city charter hereinabove set out, for the sum of \$300,000 and sell the same and use the money received therefor in paying for the construction of said railroad. The quantity of standing timber which will be opened up to market by the proposed road is 21,000,000,000 feet, and by the construction of the proposed road the wealth of their forests will become tributary to Roseburg. The defendant city intends to enter into a contract with said Roseburg & Eastern Railroad Company, and will enter into such contract unless restrained by the order of this court, wherein and whereby the said city will pay to the said Roseburg & Eastern Railroad Company for the construction of said railroad the sum of \$300,000, and, as an inducement to said company to construct said road for said sum of money and to equip, maintain and operate said road after the same shall have been constructed, will lease the same to said railroad company for a long term of years, reserving as a rental for such lease a certain and fixed part of the net earnings of said railroad company and the right to sell said railroad during the said term of said lease, and upon the sale of said railroad to terminate said lease. The said railroad company will undertake, in and by said contract with the defendant city, to construct said railroad from the City of Roseburg to the Umpqua national forest, and in consideration of the lease of said railroad from said defendant city, for a long term of years, will equip, maintain and operate said railroad as a common carrier for passengers and freight, maintaining a regular schedule of passenger and freight trains thereon, and will pay all taxes and other expenses in the maintenance and operation of said railroad, and will engage to save harmless the said

city from all such expenses and all damages resulting from the maintenance, construction and operation thereof. It is proposed by the contracting parties, to wit, the said defendant city and said railroad company, that the defendant city may retain a voice in fixing the rates for the transportation of freight over said railroad, and said company will engage that all persons desiring to employ said company for the transportation of freight, and particularly of saw-logs, will be afforded equal services and the same rates. The defendant city also proposes, in and by said contract, to grant and give to the said railroad company an option to purchase said railroad during the term of said lease for the sum of \$300,000.

There was a demurrer to the complaint, which being sustained, the plaintiff appeals. AFFIRMED.

For appellant there was a brief and an oral argument by *Mr. Oliver P. Coshow*.

For respondent there was a brief over the names of *Mr. Albert Abraham* and *Mr. Carl E. Wimberly*, with an oral argument by *Mr. Abraham*.

There was a brief and an oral argument by *Mr. Ralph R. Duniway*, *amicus curiae*.

MR. JUSTICE McBRIDE delivered the opinion of the court.

1, 2. Upon the case made by the pleadings the election at which the charter amendment was adopted appears to have been conducted substantially in conformity with the law. There is not in the charter of Roseburg as it appears in the Special Laws of 1905, page 33, any provision for holding special elections upon initiative

measures, but Section 1a, Article IV, of our Constitution provides:

“The manner of exercising said powers shall be prescribed by general laws, except that cities and towns may provide for the manner of exercising the initiative and referendum powers as to their municipal legislation.”

This constitutional provision we consider ample to authorize the city by ordinance to prescribe the manner in which the election shall be held, and this it has done by Section 8 of Ordinance 208, which requires the recorder, at least 30 days prior to the time when the election is to be held, to cause to be printed 50 notices announcing the filing of the petition with a statement of its tenor and effect, etc., and to cause one or more of such notices to be posted in each ward of the city for a period of 10 days before the election and a notice stating the time and place of the election, with a brief statement of the measure to be voted on, to be published in some newspaper of general circulation in the city for two weeks preceding the election. All this was done, and more, as it appears that the notices were printed in two city papers of general circulation instead of one, and it is safe to assume that every voter in the city knew just when and where and for what purpose the election would be held. Section 10 of said ordinance requires the council to appoint judges and clerks of election and to designate the polling places, but further provides that in case of a failure on its part to perform these duties, the clerk shall designate the polling places, and that the electors present at the time for opening the polls shall elect the judges and clerks. The council did not comply with either of these requirements, and, as before noted,

the clerk in the notice of election designated the polling places and inserted in the notice the following:

“The council having failed to appoint judges and clerks for said election within the time provided by law, or at all, the qualified electors present at the polling places in each ward at the time for the opening the polls will elect, by *vive voce* vote, judges and clerks for said election.”

Thus it appears that every provision of the ordinance requisite to constitute a valid election was complied with.

Section 14 of the charter of Roseburg (Sp. Laws 1905, p. 36) provides, among other qualifications of a voter:

“He shall be the owner of real or personal property in his own right and name, situated within the corporate limits of the City of Roseburg, and shall have paid a tax thereon, or shall be subject to pay a tax thereon, as shown by the last assessment-roll of the county of Douglas.”

And it is stated in the complaint that the judges of election were instructed to permit none but taxpayers to vote. A similar provision in the charter of the City of Salem was held void in *Livesley v. Litchfield*, 47 Or. 248 (83 Pac. 142, 114 Am. St. Rep. 920), which was a case arising out of the refusal of the election officers to accept the vote of a nontaxpayer at an election held for the purpose of choosing city officers. Whether the same rule would obtain in an election held purely for the purpose of determining whether the city would adopt or reject a measure involving solely a question of taxation has not been determined by any decision involving that exact question, although in *Oregon-Wisconsin Timber Co. v. Coos County*, 71 Or. 462 (142 Pac. 575), it was held that Section 6391, L. O. L.,

prescribing the qualifications of voters at district road meetings, and which limited the right to vote at such meetings to taxpayers, was not violative of Section 2, Article II, of the Constitution. But it is unnecessary to decide this question here, as there is nothing to indicate that any vote was refused by reason of the person offering to vote being a nontaxpayer, and it is a matter of common notoriety that the nontaxpaying vote usually preponderates in favor of any measure involving public expenditures. It is easy to be generous with other people's money, but the man who has to foot the bill by an increase in his taxes is generally cautious about enlarging them. Neither is there anything unusual in the fact that out of an electorate of over 2,000 only 721 votes were cast at the election. At general elections in this state, where party spirit runs high, not more than 80 per cent of the actual number of electors attend the polls, while at special elections of this character the number is small compared with the actual registered vote. Thus in *State ex rel. v. Portland*, 65 Or. 273 (133 Pac. 62), it appeared that on the question of the adoption of the commission form of government, a matter of extraordinary moment to the citizens of Portland, only 46 per cent of the total vote was polled, and in *Kiernan v. Portland*, 57 Or. 454 (111 Pac. 379, 112 Pac. 402, 37 L. R. A. (N. S.) 339), upon a measure involving an expenditure of \$2,000,000, about 25 per cent only of the total vote was cast, while in the case of *Thielke v. Albee*, 76 Or. 449 (150 Pac. 854), recently decided here, wherein the regulation of "jitneys" had been thoroughly discussed by the press and public, only about 30 per cent of the vote was cast. In the case at bar there were 721 votes cast, 643 being in favor of the amendment and 78 against it. It is only reasonable

to conclude that if every voter had gone to the polls, the vote would have maintained about the same proportion.

4. In our opinion so much of Chapter 159, Laws of 1915, as attempts to restrict the power of cities and towns to levy taxes is antagonistic to Section 2, Article XI, of our present Constitution, which gives to cities and towns the power to enact and amend their charters, subject only to the Constitution and criminal laws of the state. The evident purpose of this amendment was to prevent legislative interference with purely local and municipal matters, and to extend to the voters of such municipalities full power to regulate these subjects as they might see fit. City taxation is entirely a local matter with which the people of the state at large have no concern. The writer, while still adhering to the dissenting opinions expressed in *Kalich v. Knapp*, 73 Or. 558 (145 Pac. 22); and *Branch v. Albee*, 71 Or. 188 (142 Pac. 598), considers it is settled in this state that as to matters purely municipal the state legislature cannot intermeddle by either general or special legislation, although as to matters affecting the people generally the power of the legislature is still unlimited, and the latter proposition cannot be maintained unless this court shall materially modify its holding in *Kalich v. Knapp*.

5. It is suggested that the designation of the terminus of the road is indefinite, but we find no such uncertainty as would render the description void.

6. Objections are also suggested as to the validity of the contract with the railroad company for the construction and leasing of the road, but these we deem to be sufficiently met and settled in *Churchill v. Grants*

Pass, 70 Or. 283 (141 Pac. 164), and will not be further considered. Many objections might be raised to the contract considered as a business proposition, but with this we have nothing to do. The writer ventures the prophecy that in the end the citizens of Roseburg will regret ever having gone into the business of railroad building, but that is their affair exclusively.

7. The attorney for several dissenting taxpayers has appeared *amicus curiae* and attempted to show by affidavit that this is a fictitious suit, in which there is no real controversy between the parties, but is begun and carried on with the intent to have this controversy decided against the plaintiff, insisting that the suit should be dismissed. Our right to do this is undoubted, but it is conceived that such a drastic course should not be pursued except where the fictitious character of the alleged controversy appears either from the pleadings or from satisfactory evidence. More especially is this true where the persons so appearing had an opportunity to have been heard in the court below and neglected, as in this case, to avail themselves of it.

8. The plaintiff is a taxpayer of the city, and is not shown to have any financial interest in the proposed contract or in the bond issue outside of the fact that he will be called upon to pay taxes to meet the principal and interest upon the bonds as they mature. Under these circumstances it was his right, and even his duty, to contest the proceedings and have it judicially determined whether or not he might be called upon to pay an illegal tax upon a project that months or years afterward might be thwarted by judicial proceedings. In his complaint, which is brought not only on his own account, but on behalf of all others simi-

larly situated, he has pleaded everything necessary to have enabled the parties now appearing *amici curiae* to present the whole case. It was not necessary for him to have pleaded the city charter, because the court will take judicial notice of that; neither was it necessary for him to have pleaded the unconstitutionality of the law of 1915, because the court takes judicial notice of all acts of the legislature. While this is a friendly suit, that is, one pursued without rancor and with the understanding that no unnecessary delays will be permitted, the controversy is none the less real, and we are not disposed to assume that the parties who failed to take advantage of presenting their case in the court below are exercising any greater degree of good faith than plaintiff.

The decree of the Circuit Court is affirmed.

AFFIRMED.

MR. JUSTICE BURNETT dissenting.

Motion to dismiss submitted on briefs February 1, denied February 16, 1915.

Argued on the merits May 25, modified June 15, rehearing denied September 7, 1915.

WILLIAMS v. PACIFIC SURETY COMPANY.

(146 Pac. 147; 149 Pac. 524.)

Appeal and Error—Abstract—Insufficiency—Remedy.

1. Jurisdiction of an appeal having been obtained by the filing of a transcript, if respondent considers the abstract filed by appellant improper or unfair, his remedy is to file such an additional abstract as he deems necessary to a full understanding of the questions involved, as provided by Supreme Court Rule 7 (56 Or. 616, 117 Pac. x).

Appeal and Error—Bill of Exceptions—Abstract—Diminution of Record.

2. Where an abstract of the record on appeal refers to a bill of exceptions and states that a transcript of the testimony is made a

part thereof, but neither has been filed in the Supreme Court, a diminution of the record may be suggested and proper correction made on application if counsel cannot stipulate the facts desired as authorized by Supreme Court rule 40 (56 Or. 629, 117 Pac. xiv.)

Evidence—Materiality—Admissibility.

3. Where the time when papers were executed was in issue, the papers themselves are properly received in evidence.

Evidence—Construction.

4. Where a contract provided that both parties should procure and deliver to the other, as security, bonds in the sum of \$25,000, or, in lieu thereof, other security satisfactory to the parties, mortgages given by plaintiff instead of a surety bond should be received in evidence showing the way in which the parties construed the contract.

Principal and Surety—Action on Bond—Evidence.

5. Where the seller of a sawmill agreed to deliver to the purchaser a certain number of sawlogs, and executed a bond to secure performance, it was proper, in a suit on the bond, to show that the sawmill was of much less value than the amount paid, for the excess was the consideration for the log contract.

Principal and Surety—Actions—Defenses.

6. As a surety is only entitled to notice of his principal's default within a reasonable time, it cannot, as a matter of law, be held that plaintiff's failure to give notice for about a month was so unreasonable as to discharge the surety.

[As to what operates as release of surety, see note in 28 Am. St. Rep. 691.]

Assignments—Evidence—Sufficiency.

7. In an action against a surety on a logging contract, evidence held to support a finding that the contract, which had been assigned, was reassigned to plaintiff before action was brought.

Principal and Surety—Actions—Defenses.

8. A corporate surety cannot complain of technical breaches of conditions in the bond, unless such breaches cause financial loss.

[As to discharge of surety on fidelity bond by failure of employer to notify surety of employee's delinquency, see note in Ann. Cas. 1912D, 1286.]

Logs and Logging—Damages—Measure.

9. Where a logging contract was breached, plaintiff's measure of damages is the difference between the contract price and the price he would have to pay for logs at the point of delivery, or, if none could be obtained there, the price of logs at the nearest point, plus the cost of transportation, notwithstanding that price would have been too high for the profitable manufacture of lumber.

Damages—Interest—Allowance—Unliquidated Damages.

10. In an action on a surety bond for unliquidated damages, interest cannot be allowed.

From Multnomah: HENRY E. MCGINN, Judge.

This is an action by F. F. Williams against the Pacific Surety Company, a corporation, in which judgment was rendered in favor of plaintiff, and defendant appeals. Respondent files motion to dismiss appeal.

MOTION DENIED.

For the motion there was a brief submitted over the names of *Messrs. Platt & Platt* and *Mr. J. O. Bailey*.

Contra, there was a brief over the names of *Mr. Thomas H. Crawford* and *Messrs. Wilbur, Spencer & Beckett*.

In Banc. Opinion PER CURIAM.

The respondent's counsel move to dismiss this appeal on the ground that the abstract does not contain so much of the record of the trial of the cause as is necessary intelligently to present the questions to be decided. Within proper time a transcript on appeal and an abstract were filed with the clerk of this court. The transcript contains certified copies of the verdict, judgment, notice of appeal, undertaking therefor, and the service of the two latter as evidenced by indorsement noted thereon. The abstract sets forth what appear to be copies of the pleadings, verdict, judgment, motion for a new trial, order denying the same, and assignment of alleged errors. The specifications of error consist in admitting, over objection and exception, testimony, giving the questions and answers in most instances, and in others the substance of the evidence received, instructing the jury as complained of, setting out parts of the charge, refusing to instruct as requested, quoting the language desired

to be given, and the denial of the motion for a new trial.

1. Jurisdiction of the appeal was obtained by the filing of the transcript, and, if the respondent's counsel considered the abstract improper or unfair, such additional abstract as they deemed necessary to a full understanding of the questions involved might have been filed: Rule 7 (56 Or. 616, 117 Pac. x).

2. The abstract of record refers to a bill of exceptions, and also states that a transcript of the testimony is made a part thereof, but neither has been filed in this court. If a diminution of the record is desired, such correction can be made upon proper application, if counsel cannot stipulate the facts desired: Rule 40 (56 Or. 629, 117 Pac. xiv).

The motion to dismiss the appeal is denied.

MOTION DENIED.

Modified June 15, rehearing denied September 7, 1915.

ON THE MERITS.

(149 Pac. 524.)

In Banc. Statement by MR. JUSTICE BENSON.

This action was commenced in January, 1911, and by it plaintiff seeks to recover damages for breach of a contract to furnish logs to the sawmill located at Glendale, Oregon, then owned by plaintiff and defendant Ford. This is the third appeal. The issues, so far as they are of interest in this discussion, are briefly as follows: On August 17, 1910, plaintiff and defendant Ford purchased a sawmill, certain personal property and a small tract of land to be used in con-

nection therewith, from the defendant Oregon-Idaho Company, and at the same time entered into a contract with such company whereby the latter was to deliver to the mill a total of 200,000,000 feet of sawlogs of the quality and at the times mentioned in the contract. This agreement also contained the following clause:

"It is further understood and agreed that both parties to this contract shall procure and deliver to the other party, as security for the faithful performance of the respective covenants of this agreement, bonds in the sum of twenty-five thousand dollars (\$25,000) conditioned upon the faithful performance of such covenants and agreements and with good and sufficient sureties, or, in lieu thereof, other security satisfactory to the parties who are to receive the same."

Pursuant to this provision, the defendant Oregon-Idaho Company gave to plaintiff and defendant Ford a bond in the following form:

"Home Office, San Francisco, California.

"Know all men by these presents: That the Oregon-Idaho Company, a corporation, organized and existing under and by virtue of the laws of the State of Oregon (hereinafter called the 'principal') and the Pacific Surety Company, a corporation, organized and existing under the laws of the State of California, and whose principal office is located in San Francisco, California (hereinafter called the 'surety'), are held and firmly bound unto A. H. Ford and F. F. Williams (hereinafter called the 'owner') in the full and just sum of twenty-five thousand and 00/100 (\$25,000.00) dollars, lawful money of the United States of America, to the payment of which sum of money, well and truly to be made, the said 'principal' binds himself, his heirs, executors and administrators, and the said 'surety' binds itself, its successors and assigns, jointly and severally, firmly by these presents.

"Dated this 1st day of August, A. D. 1910."

The plaintiff did not deliver or tender any bond, but made a cash payment of \$10,000 on the purchase price of the mill and other property and gave a mortgage thereon for \$15,000, the balance of such purchase price. The Oregon-Idaho Company breached the contract by failing to deliver the logs at the time and in the quantities agreed upon, and on December 12, 1910, was declared an involuntary bankrupt by the United States District Court. Thereupon this action was brought upon the bond above set out. The other defendants having defaulted, the Pacific Surety Company filed its answer, in which, among other things, it pleaded affirmatively that the plaintiff had forfeited its right to recover by failure to execute and deliver the bond provided for in the logging contract and by refusing to pay more than \$3.50 per thousand for certain of the logs delivered, whereas the contract called for a uniform price of \$7 per thousand; that they further violated the terms of the bond by assigning their interest in the logging contract to the Cow Creek Mill Company; that plaintiff also failed to immediately notify the surety of the neglect on the part of the Oregon-Idaho Company to supply logs according to the terms of the contract, and that, at all times since the execution of the contract and bond in controversy, the state of the lumber market in Oregon has been such that the cost of manufacturing sawlogs into lumber and placing the same upon the market, together with the payment of \$7 per thousand feet for logs at plaintiff's sawmill, has been largely in excess of any market price obtainable for such lumber, and that therefore plaintiff has not been substantially damaged by the alleged breach of the contract. Plaintiff's reply consists of denials and the allegation that,

if the logging contract had ever been assigned, it has been reassigned to plaintiff and Ford and that plaintiff and Ford own practically all of the stock in the Cow Creek Mill Company. From a judgment for plaintiff, defendant Pacific Surety Company appeals.

MODIFIED. REHEARING DENIED.

For appellant there was a brief over the names of *Mr. Thomas H. Crawford* and *Messrs. Wilbur, Spencer & Beckett*, with oral arguments by *Mr. Crawford* and *Mr. Schuyler C. Spencer*.

For respondent there was a brief over the names of *Mr. J. O. Bailey* and *Messrs. Platt & Platt*, with oral arguments by *Mr. Bailey* and *Mr. Robert Treat Platt*.

MR. JUSTICE BENSON delivered the opinion of the court.

3, 4. Defendant's first contention is that the trial court erred in admitting in evidence the deed from the Oregon-Idaho Company to Ford & Williams, the bond in suit, and the escrow agreement with which they were deposited with the Security Savings & Trust Company about the 1st of August, 1910, and also the note and mortgage for the unpaid portion of the price of the mill property. This contention, however, is untenable. There is a clear-cut issue in the pleadings as to whether the contract, bond, deed and mortgage were executed and delivered on August 1st, or August 17th, and these exhibits were relevant and proper evidence thereon. A broader justification for the ruling of the trial court is found in the fact that the escrow agreement contains evidence tending to show the interpretation put upon the logging contract by the parties thereto in regard to the giving of a bond, "or, in lieu

thereof, other security satisfactory to the parties who are to receive the same." In the case of *City Messenger & Delivery Co. v. Postal Telegraph Co.*, this court, speaking by Mr. Justice BEAN, says:

"There is no more certain way of finding out what the contracting parties meant than to ascertain what they have actually done in carrying out the contract. By so doing we learn what construction the parties themselves have placed upon the terms of their stipulation": *City Messenger & Delivery Co. v. Postal Telegraph Co.*, 74 Or. 433 (145 Pac. 657, at page 660), and cases there cited.

The parol testimony of plaintiff in relation to the acceptance of the cash payment and the note secured by mortgage, being specifically accepted as satisfactory security in lieu of a bond, was properly admitted upon the same theory.

5. Defendant complains that the court erred in admitting evidence tending to show that the actual value of the mill property did not exceed \$9,100, and that the remainder of the purchase price was in reality a part of the consideration for the logging contract. We think that this evidence was properly admitted for the purpose of showing what portion of the \$25,000 was actually a consideration for mill property and what part thereof was in fact a consideration for something else: 2 Devlin on Real Estate (3 ed.), 822, 823; *Scoggin v. Schloath*, 15 Or. 383 (15 Pac. 635).

6. We next consider the contention that plaintiff's case fails because he did not immediately notify defendant of the continuing breaches of the logging contract. It appears from the evidence that the papers were taken from escrow about the 17th of August, and Williams & Ford then began making repairs on the mill, while the Oregon-Idaho Company was making

preparations for active logging. On August 21st plaintiff notified the logging company that he was ready to receive logs, and the delivery thereof was begun about the middle of September; the last delivery being made about the 1st of October. Plaintiff notified the surety company of the failure to deliver logs about the 10th of October. Under the evidence, we think that it was a question for the jury to answer as to whether or not notice was given within a reasonable time. In the case of *Bross v. McNicholas*, 66 Or. 47 (133 Pac. 784), this court, by Mr. Justice McNABY, says:

“However, be the interim eight days or one day, all the plaintiff was required to do was to notify the surety company of the breach of the contract by the principal with due diligence and within a reasonable time after being apprised thereof. Whether that was done was a question solely for the jury to determine.”

7. We next consider the assignment of the logging contract and the bond upon which this action is based. The plaintiff testifies that on November 7, 1910, the contract was assigned to the Cow Creek Mill Company for collection, but that it was reassigned to himself and Ford prior to the commencement of this action. He also testifies that this reassignment was confirmed by a written reassignment after the action was begun. Defendant insists that the written evidence of the retransfer ought to outweigh the parol testimony of the plaintiff, but that was a matter for the jury to decide, and they evidently found that the reassignment was made before the commencement of this action.

8. The next subject for consideration is the statement of the trial court involved in a number of the instructions given to the jury, to the effect that the defendant cannot complain of breaches in the condi-

tions of the bond by plaintiff and escape liability thereunder, unless, by such violations of its terms, the defendant has suffered financial loss. The great weight of authority supports the doctrine announced by this court in the case of *Bross v. McNicholas*, 66 Or. 47 (133 Pac. 784), in which the following language is used:

"But, in this day and age of corporate sureties, when the burden is lightened by the payment of adequate premiums, and their final liabilities oftentimes secured by counter indemnity, the strictness of the old rule is relaxed, and the modern day surety company must show some injury done before they can be absolved from the contracts which they clamor to execute": *Baglin v. Title Guaranty Co.* (C. C.), 166 Fed. 356; *Leiter v. Dwyer Plumbing Co.*, 66 Or. 474, at page 482 (133 Pac. 1180).

In the latter this court, speaking by Mr. Justice BEAN, says:

"In order for the surety company to escape responsibility, it should appear that such company has been prejudiced by a breach of the contract. The breach must not have been merely technical, but a substantial one, working a pecuniary disadvantage to the surety company, or depriving it of some protection or privilege reserved in the bond."

It is needless to multiply citations. The instructions complained of are a correct exposition of the law.

9. We come now to the question of the measure of damages. It appears from the evidence that at Glendale, where plaintiff's mill was located, there was no available supply upon which to draw when the Oregon-Idaho Company failed to deliver logs according to its contract. There is also evidence tending to prove that the nearest available market for the purchase of

such logs was at Cottage Grove, or at Leona. The court instructed the jury as follows:

“So then you come to the question of damages. Has there been in this case a breach of the contract on the part of the Oregon-Idaho Company, and, if you determine there has been, then what is the damage which Mr. Williams is entitled to recover in this case? He is entitled to recover the difference between what these logs would cost him, if the Oregon-Idaho Company had carried out their contract, delivered in the pond at the mill at Glendale, and what he would have had to pay for logs at the time he wanted them during the continuance of this contract, at Glendale—the reasonable price at Glendale. And, if these logs could not be obtained at Glendale, then at the nearest available point, added to that, transportation to Glendale. That is the measure of damages in the case—the difference between what he would have gotten them for, during the life of this contract, and what he would have had to pay for them, if he had gone out into the market and purchased them at Glendale.”

Defendant contends that neither Cottage Grove nor Leona was an “available” market under the evidence, for the reason that the cost of transportation from any of these points was prohibitive, and that logs so purchased could not have been manufactured at a profit. In answer to the suggestion, we need only to say that several witnesses testified that these were available markets, and we think the court’s instruction was correct.

10. Finally, we come to the question of interest upon the judgment. The jury returned a verdict in favor of plaintiff and defendant Ford in the following form:

“We, the jury duly impaneled to try the above-entitled cause, find in favor of plaintiff and A. H. Ford, and against the defendant Pacific Surety Company, and assess their damages in the sum of \$25,000

and interest from October 1, 1910, at 6 per cent per annum."

And on the same day the court entered judgment thereon for the sum of \$31,202.17, being the amount of said \$25,000, with interest to that date, November 19, 1914, computed at 6 per cent. There is no controversy about the nature of this action. It is for unliquidated damages, and the rule is well settled in this state that interest cannot be recovered thereon: *Hawley v. Dawson*, 16 Or. 348 (18 Pac. 592); *Pengra v. Wheeler*, 24 Or. 532 (34 Pac. 354, 21 L. R. A. 726); *Smith v. Turner*, 33 Or. 381 (54 Pac. 166). The court erred in giving judgment for interest.

The judgment of the lower court must therefore be modified to the extent of eliminating the amount of interest computed prior to the date thereof. In all things else it is affirmed.

MODIFIED. REHEARING DENIED.

MR. JUSTICE BURNETT dissenting.

Argued March 17, affirmed April 6, rehearing granted May 25, 1915. On rehearing former opinion set aside and judgment reversed July 6, rehearing denied September 7, 1915.

NIEMI v. STANLEY SMITH LUMBER CO.*

(147 Pac. 532; 149 Pac. 1033.)

Master and Servant—Injury to Servant—Dangerous Place to Work—Evidence—Question for Jury.

1. Whether an employer was negligent in selecting a tree to which a cable was attached near a place where employees were cutting down trees, *held*, under the evidence, for the jury.

*As to duty of active inspection of instrumentalities, see note in 41 L. R. A. 70.

As affected by fact that instrumentality was purchased from responsible dealer, see note in 40 L. R. A. (N. S.) 1120. REPORTER.

Master and Servant—Injury to Servant—Negligence—Proximate Cause—Question for Jury.

2. Whether the negligence of an employer was the proximate cause of the death of an employee, *held*, under the evidence, for the jury, under the rule that it is the duty of the jury to look at the facts and ascertain whether they are naturally and probably connected in orderly sequence with the prime cause, or disconnected by some intervening agency affecting its operation.

[As to proximate and remote causes of injury from negligence, see notes in 50 Am. Rep. 569; 36 Am. St. Rep. 807.]

Master and Servant—Injury to Servant—Contributory Negligence.

3. Whether an employee injured while cutting down a tree was guilty of contributory negligence, *held*, under the evidence, for the jury.

Master and Servant—Injury to Servant—Assumption of Risk.

4. Whether an employee injured while cutting down a tree assumed the risk arising from the negligent failure of the employer to furnish a safe place to work, *held*, under the evidence, for the jury.

Master and Servant—Injury to Servant—Employers' Liability Act.

5. A complaint in an action for the death of an employee cutting a tree which fell on wires attached to another tree, by reason of which the latter tree broke and fell on him, which alleges that the employer negligently selected an unsafe tree to which it attached wires and negligently failed to top the tree selected and to clear the timber from the tree, that by reason thereof the accident happened and rendered the work of the employee hazardous, states a cause of action, under the Employers' Liability Act (Laws 1911, p. 16), both as to machinery and inherently dangerous occupation.

[As to what is "accident arising out of and in course of employment" within Employers' Liability Act, see note in Ann. Cas. 1914D, 1284.]

Death—Action for Death—Statutory Provisions—Construction.

6. Section 380, L. O. L., providing that, where death of a person is caused by the wrongful act of another, the personal representative of decedent may sue at law therefor, if decedent, had he lived, could have sued for an injury done by the same act, is not repealed by Employers' Liability Act, but the two must be construed together, and, as far as possible, effect must be given to the provisions of each, but the provision in the Employers' Liability Act, enumerating the persons entitled to sue for death, is exclusive of Section 380, so long as any one of the persons named therein survive, but, in case none survive, the representative of decedent may sue under Section 380.

Pleading—Complaint—Cause of Action—Sufficiency.

7. A complaint must state facts sufficient to constitute a cause of action and entitling plaintiff to recover.

From Hood River: WILLIAM L. BRADSHAW, Judge.

Department 1. Statement by MR. JUSTICE BENSON.

This is an action by Joel Niemi, administrator of the estate of Oscar Laine, deceased, against the Stanley Smith Lumber Company, a corporation, for damages for personal injuries causing the death of Oscar Laine the plaintiff being the administrator of decedent's estate. The circumstances surrounding the accident, so far as they are of value here, are as follows: Defendant is a corporation engaged in the manufacture of lumber in Hood River County. In this occupation it maintains a number of logging camps in whose vicinity the trees are felled and prepared for the sawmill, to which they are subsequently transported. Among other equipment for this purpose defendant had a large aerial wire cable attached at each end to a standing tree, about 60 feet from the ground, so as to permit the logs to be hoisted and carried along said cable, and down out of the mountains. The upper one of these trees, which will be called, for the purposes of this discussion, "the gin tree," had the aerial cable attached thereto by a heavy iron band, or collar, to which were also attached five guy wires, which radiated from the collar to stumps used as anchors, which wires varied in length from 100 to possibly 125 feet. The aerial cable and guy wires were tightly stretched for staying the gin tree.

On the 12th of September, 1913, decedent, as an employee of defendant, with another, was engaged in felling trees in the vicinity of the gin tree above mentioned. They had been so employed until about 5 o'clock in the afternoon, when they cut down a tree, which in falling struck a guy wire near the stump to which it was anchored, and the shock of the impact was so great as to break the gin tree in two at a point about

22 feet below the collar to which the cable and guy wires were attached. As the gin tree broke, one of the falling branches struck the decedent, causing injuries from which he subsequently died, and this action followed. From a judgment for plaintiff, defendant appeals.

AFFIRMED.

For appellant there was a brief over the name of *Messrs. Crawford & Eakin*, with an oral argument by *Mr. Robert S. Eakin, Jr.*

For respondent there was a brief with an oral argument by *Mr. Leroy Lomax*.

Department 1. MR. JUSTICE BENSON delivered the opinion of the court.

It is conceded by the parties that the plaintiff's action is based upon defendant's liability at common law. There are two assignments of error.

1. Defendant first contends that the trial court erred in denying a motion for a nonsuit. This contention is based upon the grounds: First, that there is no evidence tending to prove any negligence upon the part of defendant in selecting the gin tree, or using it for the purpose to which it was applied. It is not necessary to go into the evidence extensively upon this point, but it is sufficient to say that, while there is some conflict in the testimony, one witness who examined the remains of the tree after the accident says that "it was a dead tree; it showed that it had been dead for some time." The evidence also discloses that the cable had been attached during the preceding fall, and we think that it was a question for the jury to answer as to whether defendant had been negligent in the selection thereof.

2. Defendant next insists the negligence alleged by plaintiff was not the proximate cause of the injury complained of. It is true that the tree was not broken by the use for which the tree was selected and used, but by the falling of a tree across one of the guy wires, which act defendant contends should be regarded as the proximate cause.

It is not always easy, in a particular instance, to place a finger upon a specific act, and safely say: "This is the act which directly produced a given result." In this case the successive steps are that defendant selected a certain tree to carry a cable, and stayed the same with guy wires. The decedent felled a tree which struck a guy wire, breaking the gin tree, of which a falling limb struck and killed him. If Laine had not felled the tree so that it struck the guy wire, the gin tree would not have broken, and the falling limb would not have caused a death. But, if the guy wire had not been attached to a defective tree, it may be that no accident would have happened. The falling tree striking the wire, the impact breaking the gin tree, and the falling limb killing the man, might, we think, be classed as an unbroken chain of causal events. As is said by Mr. Justice LORD, in the case of *Hartvig v. Northern Pac. L. Co.*, 19 Or. 525 (25 Pac. 359):

"Whether the injury in a particular case was such natural and proximate result of the wrong complained of is ordinarily for the decision of the jury.' * * It is their province to look at the facts as they transpire, and ascertain whether they are naturally and probably connected in orderly sequence with the prime cause, or disconnected by some intervening agency affecting its operation."

Under the evidence we think that this question was properly submitted to the jury.

3. We shall now consider defendant's contention that contributory negligence is conclusively disclosed by plaintiff's evidence. It appears from the record that Laine and a fellow-workman had been cutting trees all day, in the same vicinity, under the direction of a foreman. A short time prior to the falling of the tree which struck the guy wire, they had felled another tree which had lodged against a hemlock. The last tree which was cut, and fell against the guy wire, stood about 40 feet away from the gin tree, and about midway between two guy wires, which were 10 feet apart. A short distance beyond this tree, and also midway between the guy wires, stood the hemlock, with the cut tree lodged against it. Before felling the last tree Laine asked the foreman if he should not cut the hemlock, but the foreman said, "No." The surviving workman, Kyllonen, says at one time that they felled the last tree in such a manner as to dislodge the tree which was leaning against the hemlock. At another time he says: "We tried to fall it straight between the guy wires." Taking this evidence into consideration, we are forced to the conclusion that it was for the jury to say whether there was contributory negligence.

4. We come, then, to the question of the assumption of risk, and this problem is closely connected with that of proximate cause. If the jury should find that the attaching of the cables and guy wires to a defective tree was a link in a continuous chain of causes without a break, and that defendant was negligent in the matter of furnishing decedent with a safe place to work, then it would also be their duty to determine whether or not the danger arising from such negligence was so open and apparent that the servant should have known it and therefore assumed the risk.

Appellant's second assignment is that the court erred in denying the motion for a directed verdict. What we have already said in regard to the motion for a nonsuit is equally applicable to this; and the judgment must be affirmed.

AFFIRMED. REHEARING GRANTED.

MR. CHIEF JUSTICE MOORE, MR. JUSTICE BURNETT and MR. JUSTICE MCBRIDE concur.

Reversed July 6, rehearing denied September 7, 1915.

ON REHEARING.

(149 Pac. 1033.)

A rehearing having been granted, the former opinion was set aside and judgment of the lower court is reversed and action dismissed without prejudice.

REVERSED. REHEARING DENIED.

For appellant there was a brief over the name of *Messrs. Crawford & Eakin*, with an oral argument by *Mr. Thomas H. Crawford*.

For respondent there was a brief and an oral argument by *Mr. Leroy Lomax*.

In Banc. MR. JUSTICE BENSON delivered the opinion of the court.

Upon the rehearing in this case a question was suggested which had not been presented at the former argument herein, and this is the only matter which we shall now consider: Does the complaint state a cause of action in favor of the administrator? The sub-

stance of the complaint is that Oscar Laine died intestate, and that plaintiff is the duly qualified administrator of his estate; that the defendant corporation was and is engaged in operating a sawmill and lumbering plant; that a part of defendant's equipment consisted of an aerial cable for transporting sawlogs, which cable was operated by means of a donkey-engine; that the cable was attached at each end to a tree about 60 feet above the ground; and that such trees were stayed by guy wires radiating in several directions. Then follow these recitals of the alleged acts of negligence causing the death of Laine:

"That the defendant carelessly and negligently, and in disregard of the lives and safety of its employees, and particularly of the deceased, selected an old, doty, faulty and unsafe tree to attach one end of said cable wire to, and did carelessly, negligently, and in disregard of the lives and safety of its employees, and particularly of the deceased, attach and fasten one end of said cable wire to said old, doty, faulty and unsafe tree, and did carelessly and negligently, and in disregard of the lives and safety of its employees, and particularly of the deceased, attach and fasten to said old, doty, faulty and unsafe tree, two certain wires, commonly known as guy wires, which were stretched and extended out from said old, doty, faulty and unsafe tree, the other ends of said guy wires being attached to two certain stumps, and each being stretched to a high tension, and that said cable wire and said guy wires were of great weight, and produced much strain upon said old, doty, faulty and unsafe tree, to which said wires were so attached, and said tree and said wires were in such condition, and were so existing, at the time the deceased received his injuries and lost his life, as hereinafter complained of. That the defendant carelessly and negligently, and in disregard of the lives and safety of its employees, and particularly of the deceased, attached said cable wire and said guy wires to said old, doty, faulty and unsafe tree at

a point about 60 feet from the ground, and carelessly and negligently, and in disregard of the lives and safety of its employees, and particularly of the deceased, failed, neglected and omitted to top said tree above said wires; and carelessly and negligently, and in disregard of the lives and safety of its employees, and particularly of the deceased, left the top of said tree above said wires standing, which was unsafe and dangerous to the lives and safety of defendant's employees, and particularly the deceased, in working near and above said tree.

"That defendant carelessly and negligently, and in disregard of the lives and safety of its employees, and particularly of the deceased, negligently and carelessly failed and omitted to fall, clear, and clean the timber and brush away from and about said old, doty and faulty tree, before so attaching said cable and said guy wires to said tree.

"That defendant, in disregard of the safety of its employees, particularly of the deceased, carelessly and negligently left standing, near said old, doty and faulty tree, to which said cable and guy wires were so attached, certain timber, which was standing between said guy wires and in the vicinity of and near to said old, doty and faulty tree, to which said cable and said guy wires were so attached.

"That by reason of said tree, to which said cable and said guy wires were so attached, being old, doty and faulty, and by reason of the same not being topped above where said wires were so attached, and by reason of the timber and brush in the vicinity of said tree not being cut, removed and cleared away, and by reason of the great tension of said cable and said guy wires, and the weight and strain upon the same, the said premises, and the vicinity about said old, doty and faulty tree, were at the times and dates hereinafter complained of, and at the time and date deceased received his injuries, resulting in his death, as hereinafter complained of, an extremely dangerous and unsafe place for defendant's employees, and particularly the deceased, to engage in their work of cutting and

falling the timber about said premises, and near said old, doty and faulty tree, as hereinafter particularly alleged.

"That on or about the 12th day of September, 1913, the deceased was employed by the defendant to cut down and fall timber for the defendant in the mountains, to be transported to its said sawmill and lumbering plant, and on the 14th day of September, 1913, while deceased was so employed, by the defendant, the defendant, in disregard of the lives and safety of its employees, and particularly of the deceased, carelessly and negligently instructed and directed the deceased to go to the vicinity of said old, doty and faulty tree, to which said cable and said guy wires were so attached, and to the said extremely dangerous and unsafe premises, as hereinabove alleged, and carelessly and negligently, and in disregard of the lives and safety of its employees, and particularly of the deceased, did instruct and direct said deceased to cut down and fall one large green tree, which was standing between said guy wires, and at a distance about 40 feet from said old, doty and faulty tree, to which said cable and said guy wires were so attached, as hereinabove alleged, and that said guy wires were only about 20 feet apart at the place where said tree, which deceased was so instructed and directed to fall, was standing.

"That deceased did, in pursuance to said instructions and directions, so given him by the defendant, proceed to and did cut and fall said green tree so standing between said guy wires, and at said distance of about 40 feet from said old, doty and faulty tree, to which said cable and guy wires were so attached, and did cut and fall the same in a careful, cautious and prudent manner, directing and falling the same parallel with said guy wires and away from said old, doty and faulty tree, to which said cable and said guy wires were so attached. That said tree, so cut and fallen by the deceased, had limbs projecting out from the trunk of said tree, and that, in the falling of said tree, said limbs, without any fault or carelessness upon the part of the deceased, struck one of said guy wires, pro-

ducing weight and strain upon said wires, and said old, doty and faulty tree, to which said cable and guy wires were so attached, and thereby and by reason of which said old, doty and faulty tree was broken, and the top thereof broken, and did fall and strike the deceased upon the head and body of said deceased, mortally wounding and injuring him, whereby, and by reason of which said mortal wounds and injuries, said deceased thereafter, and in the evening of the 14th day of September, 1913, died. That said mortal wounds, injuries and the death of said deceased, which resulted therefrom, were caused and produced by and through the negligence and carelessness and negligence and omission of the defendant, as hereinabove alleged.

“That defendant, by the exercise of ordinary care and prudence, could have known, and did know, that said premises above described were extremely dangerous and hazardous to the lives and safety of its employees, and particularly the deceased, who was sent to work near and about said premises, and by the exercise of ordinary care and prudence could have known, and did know, that said old, doty and faulty tree, to which said cable and guy wires were so attached, was extremely dangerous and unfit to so use, and to so attach said cable and guy wires to, and was extremely dangerous and hazardous to the lives and safety of the employees of the defendant, and particularly the deceased, to be left so standing without being topped, and could have known, by the exercise of ordinary care and prudence, and did know, that it was extremely dangerous and hazardous to lives and safety of its employees, and particularly the deceased, to leave said premises in and about said old, doty and faulty tree, and said cable and said guy wires, without the timber and brush having been, prior thereto, fallen and cleared away, and could have, by exercise of ordinary care and prudence, known, and did know, that the place where said deceased was so instructed and directed to work, as above alleged, and where said deceased so received his said mortal wounds and injuries, as above alleged, which resulted in the death of said deceased, was an

extremely hazardous, dangerous, and unsafe place for defendant's employees, and particularly the deceased, to work.

"That the defendant was the owner and had charge of the said donkey-engine, said cable wire, said guy wires, and said old, doty and faulty tree, and the entire structure, apparatus, and device so used by said defendant in moving, hauling and transporting its said logs and timber to its said sawmill and lumbering plant, and had charge of and was responsible for the said work in which deceased was engaged at the time he sustained said injuries, so causing his death, and had charge of and was responsible for the premises and place where said cable wire, said guy wires, and said old, doty and faulty tree were situated, and directed deceased to and was responsible for deceased's working at said place, near said cable wire and said guy wires, and said old, doty and faulty tree.

"That said work in which deceased was so engaged at the time he received said injuries was very hazardous and involved great risk and danger to the lives of the employees of defendant, including the deceased, and defendant failed and neglected to use such device, care and precaution which was practicable to use for the protection and safety of the lives of its employees and the protection and safety of the life of deceased.

"That said old, doty and faulty tree, to which said cable and said guy wires were so attached, could have been topped a few feet above where said wires were so attached, and the premises near said old, doty and faulty tree could have been cleared away by the defendant, which would have rendered the said place where deceased was so working when he sustained said injuries, much safer and much less dangerous to the life of deceased, and would not have impaired or in any manner detracted from the efficiency and use of said cable wires, and said guy wires, said old, doty and faulty tree, and said device and apparatus so used by defendant in moving, hauling and transporting its said logs and timber to its said sawmill and lumbering plant, and defendant's failure, neglect and omission

to use such care and take such precautions, resulted in deceased sustaining such injuries, which caused his death, as above alleged."

5. It will be observed that the allegations above quoted bring the cause of action fully and completely within the provisions of the Employers' Liability Act, both as regards machinery and an inherently dangerous occupation. Section 4 of the act referred to reads as follows:

"If there shall be any loss of life by reason of the neglects or failures or violations of the provisions of this act by any owner, contractor, or subcontractor, or any person liable under the provisions of this act, the widow of the person so killed, his lineal heirs or adopted children, or the husband, mother, or father, as the case may be, shall have a right of action without any limit as to the amount of damages which may be awarded": Laws 1911, p. 17.

6. Plaintiff contends that he is entitled to bring this action under the provisions of Section 380, L. O. L., which reads as follows:

"When the death of a person is caused by the wrongful act or omission of another, the personal representatives of the former may maintain an action at law therefor against the latter, if the former might have maintained an action, had he lived, against the latter, for an injury done by the same act or omission. Such action shall be commenced within two years after the death, and damages therein shall not exceed \$7,500, and the amount recovered, if any, shall be administered as other personal property of the deceased person."

This law was enacted by the legislature in 1862, and is a modified version of the English statute, known as Lord Campbell's Act, adopted because of the fact that, under the common law, no recovery could be had for the death of a person by the wrongful act or omission

of another. The Employers' Liability Act was adopted by the people of this state by initiative in 1910. It has been held by this court that the provisions of the later act do not repeal Section 380, L. O. L.: *Statts v. Twohy Bros. Co.*, 61 Or. 606 (123 Pac. 909); *McFarland v. Oregon Electric Ry. Co.*, 70 Or. 28 (138 Pac. 458). The two acts, being directed to one common object (that is, to provide a statutory action for the death of a person resulting from the wrongful act or omission of another), must be construed together, and, as far as possible, effect must be given to the provisions of each. A special provision for a certain class of cases will take that class out of the general terms used in either statute. Thus the Employers' Liability Act provides by whom an action for the wrongful acts or omissions enumerated therein shall be instituted, and, as to a death arising therefrom, it is exclusive of Section 380, as long as any one of the beneficiaries named therein survive, since the terms of that section are general: *Pittsburgh, Ft. Wayne & Chicago Ry. Co. v. Vining's Admr.*, 27 Ind. 518 (92 Am. Dec. 269). In discussing this question in the case of *Statts v. Twohy Bros. Co.*, 61 Or. 606 (123 Pac. 909), Mr. Justice MOORE says:

"The act first referred to is limited in its application to certain enumerated causes, and it would appear that an action to recover damages for the death of an employee could be maintained only by a relative of the deceased."

It is conceded that there can be but one recovery; and therefore to hold that the one who first appeals to the courts may thereby bar the other would be to open the gates to an indecent scramble for precedence in beginning an action and would render it possible for a designing person to have himself appointed adminis-

trator of the decedent's estate even before the widow and orphaned children had learned of the calamity which had overtaken them. While there is scant authority upon the question as to whether or not the administrator can maintain the action in the event of a failure of all the beneficiaries named in the Employers' Liability Act, we conclude that the better view is well expressed in the case of the *Pittsburgh, Ft. Wayne & Chicago Ry. Co. v. Vining's Admr.*, 27 Ind. 518 (92 Am. Dec. 269), in which the court says:

"So, also, although by the provisions of Section 27 [2 Gav. & H. St. 1862, p. 56] the action for the death of a child must be brought by the father, or in case of his death, or desertion of his family, or imprisonment, by the mother, or by the guardian for his ward, it seems clear to us that, where there was neither father, mother, nor guardian, the case, not being specially provided for, would then come within the provisions of Section 784 [page 330], and the administrator would be the proper person to sue."

7. There was some discussion upon the argument as to whether this question should not have been raised by a plea in abatement, but we think that it goes to the merits, and that a complaint, in order to state facts sufficient to constitute a cause of action, must not only state facts sufficient to entitle someone to a recovery, but must also show, upon its face, facts which disclose that the plaintiff is the one who is entitled to recover: 31 Cyc. 102, and cases there cited.

It follows from these views that the judgment of the lower court must be reversed and the action dismissed, without prejudice to the right of the one entitled under the Employers' Liability Act to bring an action for the death of Laine.

REVERSED. DISMISSED WITHOUT PREJUDICE.

MR. JUSTICE McBRIDE did not sit.

Argued June 9, reversed July 13, rehearing denied September 7, 1915.

HAYNES v. OREGON-WASHINGTON R. & N. CO.*

(150 Pac. 286.)

Railroads—Injuries to Trespasser—"Negligence."

1. Plaintiff, a minor, was injured by the fall of a bank of earth forming a cave near defendant's right of way in a cut formed by the right of way. Plaintiff had taken refuge in the cave to escape a shower, and after the shower remained there with some companions at play. The wires of the railroad fence in the vicinity were down, and defendant was chargeable with notice of trespass of boys on the track, and might, by reasonable diligence, have acquired knowledge of the cave, which was attractive to children. *Held*, that negligence being an infraction of a legal obligation due from one person to another, and defendant owing no duty to plaintiff, who was a mere trespasser, except not to negligently or recklessly injure him, defendant was not liable.

[As to liability of land owner for injury to trespassing child on account of unguarded pond, pool, well, etc., see note in *Ann. Cas.* 1913A, 1032.]

From Multnomah: HENRY E. MCGINN, Judge.

Department 2. Statement by MR. CHIEF JUSTICE MOORE.

This is an action by James O. Haynes, a minor, by O. S. Haynes, his father and guardian *ad litem*, against the Oregon-Washington Railroad & Navigation Company, a corporation, to recover damages for a personal injury. The facts are that a part of the defendant's railway, extending northerly about a half mile from St. Johns, Oregon, is cut through a hill, which inclines westward toward the Willamette River. The top of the east slope of the passage, at the place in question, is about 37 feet above the track. From the surface of the bank at that place, the excavation is

*As to the doctrine of "attractive nuisance," see notes in 19 L. R. A. (N. S.) 1094; 47 L. R. A. (N. S.) 1101; 50 L. R. A. (N. S.) 1147.

As to duty of property owner to trespassing children, see note in 32 L. R. A. (N. S.) 559.

made through clay about 8 feet, the remainder of the depth being through sand. Wires strung on wooden posts, set on each slope 25 feet from the middle of the railway track and parallel therewith, form right of way fences. No public highway intersects or approaches the track at the place mentioned. Prior to November 23, 1913, a cave of about a cubic yard had been made in the sand on the east slope, immediately below the line of clay. On that day the plaintiff, then 12 years old, and three other boys, returning across lots from the river, went upon the railway track, and, in order to escape a shower, climbed up to and entered the cave. After remaining there a few moments, one of the boys left to attack with clods his companions, who were playing the hole was a gold mine and he a robber, when the bank fell, entombing the occupants of the cave and injuring the plaintiff. The complaint charges, in effect, that the defendant was negligent in failing to maintain on its right of way fences to protect children, and recklessly allowed the bank to become and remain unguarded; that in excavating the earth, crevices were made, and the bank of the cut was and for a long time had been dangerous; that the bank was carelessly allowed to be a place attractive to children of tender years who, without warning, resorted to it, of which facts the defendant had knowledge. The answer denies the material averments of the complaint, and for a further defense alleges that, without the defendant's knowledge and in violation of its rules, the plaintiff entered upon the railway track through the right of way fences, which were in good repair, and dug a hole in the bank, thereby removing a part of the support of some earth, causing it to fall upon him; and that whatever injury he sustained resulted

from his negligence in that particular. The reply put in issue the allegations of new matter in the answer, and, a trial of the cause having resulted in a judgment for \$500 against the defendant, it appeals.

REVERSED AND DISMISSED. REHEARING DENIED.

For appellant there was a brief over the names of *Mr. W. A. Robbins*, *Mr. Arthur C. Spencer*, *Mr. John P. Hannon* and *Mr. Charles E. Cochran*, with an oral argument by *Mr. Robbins*.

For respondent there was a brief with oral arguments by *Mr. W. A. Burke* and *Mr. J. C. Simmons*.

Opinion by MR. CHIEF JUSTICE MOORE.

It is maintained that an error was committed in refusing to direct a verdict for the defendant, as requested by its counsel, to which action of the court an exception was taken. It is argued that the defendant, a land owner, was not liable to a trespasser for an unintentional injury, or for any failure properly to fence its right of way, or to guard the banks of its cut, which by lapse of time and the effect of the elements had become steep or even precipitous, or in permitting a hole to be made in a bank of earth to which cave children could resort to escape rain, or remain to play. It is not averred in the answer that the fences referred to were put up on the boundaries of the right of way. W. D. Scisinger, a section foreman employed by the defendant, testified that the fences were supposed to mark such boundary. St. Clair Thomas, a civil engineer in defendant's service, as its witness, in answer to the question, "Does that cave come within the right of way?" replied, "No." In referring to the east bank of the cut, and alluding

to a cross-section plan which he had prepared, this witness stated upon oath: "Erosion and the elements have caused it to slough off here, to a perpendicular condition, as indicated by this drawing." No deed or other writing was offered in evidence to establish the width of the right of way at the place where the plaintiff was injured, nor was any testimony received tending to show that the cave was made by the defendant, as alleged in the complaint. In the absence of such proof, the sworn declaration of Mr. Thomas must be accepted as true, and the facts established that the cave was not on the defendant's real property, nor made by it.

Frank Haynes, the plaintiff's brother, who was with him when he was hurt, in referring to the fences along the right of way at that time, said they were down. Robert Roskowsky, who assisted in rescuing the plaintiff after the landslide, referring to the fences near the railway track, testified that "the wires were down."

It also appears from the testimony of plaintiff's witnesses that boys, during school vacation and holidays, customarily passed along and played on the railway track at the place where the slide occurred, and that the defendant's employees in charge of this part of its roadbed frequently saw such youths on these premises. This testimony is corroborated by the defendant's servants, who stated upon oath that though boys had been ordered to depart from the track, they refused to comply with the command. The defendant was therefore chargeable with notice of the trespass of the boys upon its railway track, and by the exercise of reasonable diligence, knowledge of the existence of the case might have been acquired. The cut was made through the hill by the defendant in grading its roadbed. If in performing that work the incline ex-

tended beyond the line of the right of way, and there was a failure to give the bank sufficient slope, in consequence of which a slide of earth occurred that might reasonably have been guarded against, liability would attach in favor of passengers and employees, or those persons to whom a duty was owing to protect them from injury: *Scott v. Astoria R. R. Co.*, 43 Or. 26, (72 Pac. 594, 99 Am. St. Rep. 710, 62 L. R. A. 543).

That the cave was alluring to boys must be conceded by every person whose curiosity has ever been excited by a novelty. It is not strange, then, that the plaintiff and his companions were attracted by the inviting shelter from the rain which the cave afforded, and, having gained the retreat by climbing the bank of the cut, it was not unusual that they should remain in the cave to play after the storm had abated. The writer believes that as the hole in the bank was not made or maintained for use in any manner by the defendant, and as it was obliged to guard the banks of the cut so as to protect its passengers and employees from danger of slides of earth, the plaintiff, though a trespasser, having been tacitly invited to the hole by its allurements, was also entitled to recover damages for the injury suffered by reason of the negligence of the defendant in allowing the cave to remain as an attraction to an inquisitive boy. A majority of the court, however, in the case of *Riggle v. Lens*, 71 Or. 125 (142 Pac. 346, L. R. A. 1915A, 150), reached a different conclusion, and the rule there recognized is controlling herein. In that case it was held that the owner of a millrace that was not protected by fence or guard was not liable for the death of a child who, trespassing upon premises and playing upon the banks of the artificial watercourse, fell in and was drowned, though the millrace was occasionally resorted to by

children for amusement. The decision rendered in that case is contrary to what is known as "The Turntable Cases." The first of that class in the Supreme Court of the United States is the case of *Railroad Co. v. Stout*, 17 Wall. 657 (21 L. Ed. 745), decided in the year 1873, where it was held that a child six years old was entitled to recover the damages suffered by the hurt. In deciding that case Mr. Justice HUNT, after adverting to the rule adopted in *Lynch v. Nurdin*, 1 Adol. & E. (N. S.) 29, the first case holding that a child who was a trespasser could recover for an injury caused by the negligence of another, and to similar decisions in this country, observes:

"There are no doubt cases in which the contrary rule is laid down. But we conceive the rule to be this: That while a railway company is not bound to the same degree of care in regard to mere strangers who are unlawfully upon its premises that it owes to passengers conveyed by it, it is not exempt from responsibility to such strangers for injuries arising from its negligence or from its tortious acts."

In assigning a reason for the rule thus declared, Mr. Justice BARTHOLOMEW in *O'Leary v. Brooks Elevator Co.*, 7 N. D. 554 (75 N. W. 919, 41 L. R. A. 677, 680), referring to some of the cases announcing the legal principle, remarks:

"They have for their foundation the assumption that a defendant land owner must know that children will follow their childish instincts and inclinations, and that they are without capacity to clearly discriminate between things that are dangerous and things that are not dangerous; and, therefore, if he leave upon his premises a dangerous piece of machinery unguarded and fully exposed, and in a position where it will probably be seen by children, and of a character that would naturally attract and entice children, he

must anticipate that children will go around and upon it; and he is therefore bound to use ordinary care to protect these unconscious trespassers from being unnecessarily injured by such dangerous machinery."

That this legal principle has been recognized by many able courts will be seen from an examination of the notes collating the cases referred to in the following text-books: 29 Am. & Eng. Ency. Law (2 ed.), 32; 29 Cyc. 463. An author in commenting upon the maxim, "*Sic utere tuo ut alienum non laedas*," gives utterance as follows:

"It is said that one owes no duty to an intruder or trespasser except not intentionally to harm him. Is this true as to a young child known to be in danger of being injured? Is there not an active duty owing to protect the helpless child from known danger on one's own land? * * As to the mature trespasser no duty of care is owing. The land owner, however, must not become an active aggressor, by exposing dangerous machinery unfastened where it will probably attract children, but as to the child, known to be exposed to danger by one's own act, the law of humanity, and therefore the common law, demands care. The real question is not whether a duty is owing to a child which under the same circumstances would not be owing to a grown person, but, putting the case personally, whether, knowing that an act of yours is liable to induce anyone to expose himself to danger, it is not your duty to anticipate such action on his part and use care to avoid injuring him. If an act you are contemplating, right in itself, will likely cause some one to expose himself to danger which he does not anticipate, it is your duty to take care that such exposure does not prove injurious to him. In determining the question whether the act will induce such exposure, it is your duty to consider the motives and impulses that induce action by others who are likely to be influenced by your act. If men may be misled in their judgment by your act, you must take measures to warn them or to

avoid injuring them by proper care. If children from their known childish instincts and curiosity may be led into danger, such care is due them also": Ray, Negligence of Imposed Duties, Personal, p. 32.

These extensive quotations have been made to illustrate the writer's view of the rule which should determine the question involved. A majority of the court, as then composed, having reached a different conclusion in the case of *Riggle v. Lens*, 71 Or. 125, (142 Pac. 346, L. R. A. 1915A, 150), an attempt will be made to express the opinion thus entertained. In referring to the ruling in *Railroad Co. v. Stout*, 17 Wall. 657 (21 L. Ed. 745), a text-writer remarks:

"This decision has been followed in many other cases, in some of which the doctrine therein announced was stretched to its utmost limits in its application to the facts. But some of the ablest courts of the land, in recent decisions, have refused to follow it, and in this we believe they are justified by reason, if not by the weight of authority": Elliott, Railroads (2 ed.), § 1259.

This expression of that distinguished jurist and author is not in conflict with the decision rendered by this court in *Macdonald v. O'Reilly*, 45 Or. 589 (78 Pac. 753), where, a little child having been killed while playing on poles piled in the street, the defendant was held liable for the injury thus caused by his negligence. The timbers having been piled in a public street, the child was not a trespasser in going to and playing on the nuisance so created. In *Hill v. Tualatin Academy*, 61 Or. 190 (121 Pac. 901), a little boy was injured by the discharge of a gopher gun, set in a hole on real property of the defendant, and it was held the academy was liable for the injury sustained. In that case, however, the child and his mother were not trespassers

upon the premises, but licensees at the time he was hurt. In speaking of liability for injury to trespassing young children, a text-writer says:

“In actions of injuries to children, as in other cases, there can be no recovery unless the defendant has been guilty of a breach of duty”: Elliott, Railroads (2 ed.), § 1259.

Negligence is an infraction of a legal obligation due from one person to another, and where there is no duty there can be no negligence: *Hallihan v. Hannibal & St. J. R. Co.*, 71 Mo. 113, 116; *Barney v. Hannibal & St. J. R. Co.*, 126 Mo. 372, 392 (28 S. W. 1069, 26 L. R. A. 847). The plaintiff herein was a trespasser upon premises the care of which devolved upon the defendant, and it owed to him no duty except that of not inflicting any wanton or reckless injury.

It will be remembered that the wire fences, put up to mark the boundaries of the right of way, were down at the places where the plaintiff and his companions entered upon the railway track and left it to reach the cave. Fences are erected and maintained in such places to keep domestic animals off the roadbed, thereby avoiding the possibility of a collision with them, and thus passengers and employees may escape liability to injury from a probably resulting wreck. No obligation is imposed upon a railway company to fence its track against a boy who is 12 years old, so that as to him the failure of the defendant to keep the wire fences in proper repair cannot be assigned as a ground of negligence.

To the plaintiff and his associates the cave was probably alluring. Any boy of average intelligence and of plaintiff's age when he was hurt, whose spirit of adventure is not awakened, and whose desire to

overcome obstacles is not aroused by observing novel objects in reasonably accessible places, is scarcely normal. His disposition to investigate unfamiliar things is gratified by their examination. All such objects are to his immature mind new worlds to be discovered and explored. This natural tendency, however, does not impose upon the owner of real property which is not intersected by, bordered upon, or located near a highway the duty to mark as "dangerous" a cave which is or might become hazardous.

The maxim, "*Sic utere tuo ut alienum non laedas*," is a concise statement of a legal principle which is justly applicable to a land owner when a deleterious use of his premises injuriously affects persons or property beyond his borders. He may operate thereon a boiler-shop, an abattoir, a soap or a glue factory, a smelter, or any other noisy or noxious business, and if the turbulence or the unhealthy odors or the poisonous gases do not extend beyond the boundaries of his premises, no person has sustained any actionable injury in consequence thereof. So long as he prevents the escape of these objectionable things and destructive elements from within his own confines he is under no obligation to trespassers to give warning of such dangers or nuisances; and he may make of his land any use that in his judgment best conduces to his ideas of pleasure or expectation of profit.

The writer has tried carefully to express the views of his Associates as evidenced by the opinion in *Riggle v. Lens*, 71 Or. 125 (142 Pac. 346, L. R. A. 1915A, 150), and while he does not concur in the conclusion here reached, the declaration must be made that an error was committed in refusing to direct a verdict for the defendant.

It follows that the judgment is reversed and the action dismissed. REVERSED. REHEARING DENIED.

MR. JUSTICE BEAN and MR. JUSTICE EAKIN concur.

MR. JUSTICE HARRIS delivered the following dissenting opinion.

This court held in *Hoover v. King*, 43 Or. 281 (72 Pac. 880, 99 Am. St. Rep. 754, 65 L. R. A. 790), that:

“A judgment dismissing a complaint in an action at law is a proceeding unknown to the statute,” and, “An action at law, however, is disposed of either by a judgment in favor of the plaintiff or defendant, or one of nonsuit.”

The doctrine was reaffirmed in *Mulkey v. Day*, 49 Or. 312 (89 Pac. 957). Applying the rule established by precedent, the instant case should terminate in a judgment for defendant and not in a dismissal.

Argued July 6, reversed July 20, rehearing denied September 7, 1915.

HOLMBERG v. JACOBS.

(150 Pac. 284.)

Master and Servant—Injury to Servant—Allegation of Negligence—Proof.

1. Where the complaint, in an action for injuries to a cook from the explosion of a gas stove, alleged that the explosion was due to defects in the stove, evidence that the burners had been lighted at least 20 minutes before the explosion did not authorize a recovery by plaintiff; it being incumbent on plaintiff, not only to establish the happening of the accident, but also that it happened on account of the negligence alleged in the complaint.

Evidence—Judicial Notice—Gas—Explosion.

2. In an employee's action for injuries from the explosion of a gas stove, the court will take judicial notice that gas used for fuel is so inflammable that the moment a flame is applied it will immediately ignite with an explosion, if present in any considerable volume.

[As to judicial notice, see note in 89 Am. Dec. 663.]

Evidence—Opinion Evidence—Hypothetical Question—Basis.

3. The answer elicited in response to a hypothetical question propounded to a witness on cross-examination was not available as evidence, where it was not based on evidence corresponding with the hypothesis advanced.

[As to hypothetical questions which may be put to expert, see note in 53 Am. Rep. 307.]

Trial—Nonsuit—Evidence.

4. Where the testimony for plaintiff, in a personal injury case, leaves the cause of the accident to mere speculation, a nonsuit should be entered.

From Multnomah: THOMAS J. CLEETON, Judge.

Department 1. Statement by MR. JUSTICE BURNETT.

This is an action by Eva Holmberg against Fred A. Jacobs.

The plaintiff was in the service of the defendant as a cook from July 11 to 13, 1913. She says he furnished a gas stove to be used in her employment. She then alleges:

“That this defendant carelessly and negligently allowed the said stove to become in a defective, dilapidated and dangerous condition, and the burners, flues and gas-pipes in the said stove to become so burned, rusted and corroded that gas would escape and accumulate in the said stove, making the same dangerous and unsafe when any person should attempt to light and operate the said stove; that the said stove was in a dangerous and unsafe condition as aforesaid on the 13th day of July, 1913, and this defendant knew, or by the exercise of reasonable care and prudence could have known, that the said stove was in a dangerous and unsafe condition; that this plaintiff did not know of the said danger on the 13th day of July, 1913; that, in pursuance of the duties of her employment as cook for this defendant, this plaintiff, on the 13th day of July, 1913, had lighted and was attempting to operate the said gas stove and to use the same for the purpose of cooking, but owing to the defective condition of the said stove, and an accumulation of gas resulting there-

from, an explosion of gas ensued, causing great injury to plaintiff."

These quoted averments are traversed by the answer. The remainder of the complaint relates to the nature of her injuries and consequent damages. The court denied a motion for a nonsuit made by the defendant at the close of plaintiff's case, and the trial resulted in a verdict and judgment against him, from which he appeals. REVERSED. REHEARING DENIED.

For appellant there was a brief and an oral argument by *Mr. W. B. Shively, Jr.*

For respondent there was a brief over the names of *Messrs. Benson & Benson* and *Mr. Hamilton Johnstone*, with an oral argument by *Mr. B. M. Benson*.

MR. JUSTICE BURNETT delivered the opinion of the court.

The sole question presented for our consideration is whether the court erred in refusing the motion for a nonsuit. The only evidence about how the accident happened is that of the plaintiff herself. She testifies that she began her work for the defendant on July 11th. She says:

"I got there in the morning and prepared one meal, luncheon, discovered the stove, what is in a bad condition, didn't do the work, didn't cook or bake. After the meal was over, goes to Mrs. Jacobs, tells her, 'There is something the matter with the stove; it do not work satisfactory'; and she says to me, 'I have sent for the man already to come and attend to it.' The man came later."

She states he came and examined the stove that day; returned the third day and put in new burners. Speak-

ing of the condition of the stove before the repairs were made, she said, in substance, that the pipes and burners of the stove were rusty, dirty and corroded; that the burners appeared to be clogged, as well as rusty and corroded. She says the repair man put in the new burners about 3 o'clock in the afternoon, but she gives no account whatever of their condition, whether good or bad. She did not use the stove after that until about 6 o'clock in the evening of the same day. Concerning the accident, she states:

"The dinner was prepared. I was going to bake the rolls. I went to make dessert at half-past 6, lit the oven for to get my oven hot.

"Q. At what time?

"A. At 6 o'clock; let it burn there for 10 minutes or 20 minutes, opened the oven door to see if the oven was warm enough to receive my biscuits. It wasn't. I closed the door, let it stay there for some minutes longer, opened the door again, and still it was not warm.

"Q. That is twice.

"A. And then in a few minutes I put my biscuits in. They were there for 7 minutes. I opened the oven door, and a terrible explosion and the flames leaped around me."

She stated there were two burners under the oven, and, in several places in her testimony, insisted that they were both lighted. On cross-examination she was asked:

"How many years' experience have you had with a gas stove?

"A. For the last 20 years.

"Q. You say this stove was in a very bad condition when you looked at it; you say it was rusty?

"A. I was there for one meal when I reported the ill condition of the stove.

"Q. To whom did you report the ill condition?

"A. To Mrs. Jacobs.

“Q. And what did you tell her?

“A. This stove will not stew or bake satisfactory and something had to be done to it.

“Q. Did you tell her anything else at that time?

“A. No.”

In another part of her cross-examination she was asked:

“Just tell the jury how you lit the oven (these burners) at the time this accident happened.

“A. The oven was lit and had been burning for 20 minutes before the accident happened.

“Q. It was burning?

“A. For 20 minutes before the accident.

“Q. Are you sure it was 20 minutes?

“A. Yes, because I watched the clock.”

In answer to a question by a juror, she said:

“Wait a minute. It burned for 10 minutes, and I opened the oven door to find out if my oven was warm enough to put in my rolls, and it was not warm enough to put in my rolls, so I closed the oven door and waited for the heat to increase, and I opened the oven door, and still it wasn't quite warm enough, and I closed it again, and I opened it again and put in my rolls, and the rolls were in for 7 minutes, and then I opened the door, and that is when the explosion happened so I got this terrible burn.”

The negligence charged upon the defendant is:

“That this defendant carelessly and negligently allowed the said stove to become in a defective, dilapidated and dangerous condition, and the burners, flues and gas-pipes in the said stove to become so burned, rusted and corroded that gas would escape and accumulate in the said stove, making the same dangerous and unsafe when any person should attempt to light and operate the said stove.”

A fair construction of this allegation is that the stove was in such a dilapidated condition that, although the flames used in cooking were extinguished,

the gas continued to escape into the oven, so that, on lighting it again, the accumulated volume of gas would be immediately exploded. In other words, the substance of the charge of negligence is that the stove was in such a state that the mere attempt to light it would at once set off an explosion and not that the blast would occur after the gas had been burning for some time. On the hypothesis that the stove leaked, the testimony given by the plaintiff shows the gas must have been gathering in the oven for 3 hours, or from the time the new burners were installed at 3 o'clock until she lighted the oven at 6 o'clock; and further, if her testimony is true, the explosion would have occurred the instant the match was applied; but, as a matter of fact, as she states, both burners had been lighted at least 20 minutes before the blast went off. There is no evidence to show any smell of escaping gas prior to lighting the oven. Neither is there anything to disclose that there was any way for it to escape into the oven, except through the pilot light and the two burners which had been put in only 3 hours before. There is nothing showing that there were any pipes in the oven, and the record is utterly silent as to whether there was any defect in the new burners in use when the accident is said to have occurred.

2. The averment of negligence must be proven as laid, according to the familiar rule that the testimony must correspond with the allegations of the complaint: *Knahtla v. Oregon Short Line Ry. Co.*, 21 Or. 136 (27 Pac. 91). The charge of negligence and the narration of the mishap do not correspond with each other. The mere occurrence of the injury furnishes no cause of action. Under the rule of the evidence corresponding with the allegations, it is incumbent upon the

plaintiff, not only to establish the happening of the accident as stated, but also that it happened on account of the negligence alleged in the complaint. Although she testified that the pipes were rusty and corroded, the plaintiff did not show in any way that rust or corrosion was inflammable or that they would cause a sudden detonation of the fuel vapor. It cannot be fairly said that gas was continually escaping into the oven for 3 hours, and that, upon being lighted, the explosion did not occur until 20 minutes afterward, for it is a scientific fact of which the court will take notice that gas ordinarily used for fuel is so inflammable that the moment a flame is applied it will immediately ignite with an instant explosion, if it is present in any considerable volume. According to the plaintiff's testimony, she opened the oven 3 different times after it was lighted and before the accident happened. It cannot be rationally deduced that, under the circumstances, the disruption arose from any previously accumulated gas. The only way it could get into the oven, so far as it appears from the testimony, was through the two new burners recently installed and the pilot light by which they were ignited. She insists, however, that both these burners were lighted; and, this being true, they necessarily must have consumed the gas passing through them.

The plaintiff counts somewhat upon the cross-examination of experts offered by the defendant. One hypothetical question was this:

“Mr. Patterson, if, as a matter of fact, from leaks either from the burners or from other pipes, or the stopping of the vent-pipe failing to carry away leaking gas, gas had escaped into the oven, the oven door being closed, is it possible that in the course of time, with the gas leaking into the oven, and the burners under-

neath burning at full flow for several minutes, that constantly increasing heat added to the constantly accumulated gas might cause an explosion, just the same as if flame were brought to the gas? Is that impossible under those conditions?

"A. No, sir."

This interrogatory is not applicable to the case, for the reason that there was no evidence of any stopping of the vent-pipe nor of any leak from any pipe or any way in which the gas could get into the oven, except through the lighted burners. To be available, a hypothetical question must be based upon some other evidence in the case corresponding with the hypothesis advanced. In short, having alleged the negligence to consist in allowing the stove to become so out of repair that it would leak gas to such an extent as to make it dangerous to attempt to light it, the plaintiff must establish that averment as stated, and the requirement is not met by proving that, after the stove had been lighted for more than 20 minutes, an explosion occurred.

4. Such a state of the testimony leaves the jury merely to speculate upon the actual cause of the accident, and the authorities are unanimous to the effect that a recovery cannot be made to depend upon pure speculation. The plaintiff, having assumed the burden of proof, must make her case as laid in her complaint. There is a gap both in her pleadings and her testimony between the alleged negligence and the injury of which she complains.

The judgment of the Circuit Court is reversed and the cause remanded, with directions to enter a judgment of nonsuit. REVERSED. REHEARING DENIED.

MR. CHIEF JUSTICE MOORE, MR. JUSTICE BENSON and MR. JUSTICE HARRIS CONCUR.

Argued July 9, modified July 20, rehearing denied September 7, 1915.

DWIGHT v. GIEBISCH.*

(150 Pac. 749.)

Frauds, Statute of—Parol Contracts for Sale of Interest in Real Estate—Validity.

1. Where plaintiff, owning land, encouraged defendant to enter thereon and expend large sums of money in opening a quarry on the faith of an oral agreement by plaintiff to let defendant have the rock for a specified sum, defendant performed his part of the agreement, and he could not be dispossessed by plaintiff on the theory that the agreement was not reduced to writing as required by the statute of frauds, and defendant could enjoin plaintiff from interfering with the possession so long as he continued to carry out the contract and pay the specified price for the rock.

[As to what amounts to contracts for the sale of land, within the meaning of the statute of frauds, see note in 102 Am. St. Rep. 230.]

Tenancy in Common—Contracts With Third Persons—Rights of Cotenants.

2. Evidence held to sustain a finding that a tenant in common knew that his cotenant orally agreed with a third person for the acquisition by him of the rock on the land, and where the third person on the faith of the agreement expended large sums in opening a quarry without knowledge of the interest of the tenant in common, the latter could not obtain relief in equity against the third person, but his remedy, if any, was against his cotenant for his share of the royalties obtained from the sale.

From Tillamook: WEBSTER HOLMES, Judge.

Department 1. Statement by MR. JUSTICE McBRIDE.

This is a suit brought in the first instance by W. G. Dwight against Giebisch & Joplin and G. W. Kiger to enjoin them from taking stone from a quarry in Tillamook County, and to compel an accounting for stone already taken and timber destroyed on the premises in controversy. The plaintiff alleged, in substance, that he was the owner of a one-half interest in the northeast quarter of the southwest quarter, and the

*Taking possession of real property as part performance to satisfy statute of frauds is discussed in note in 3 L. R. A. 790.

west half of the southwest quarter, of section 14, and the southeast quarter of the southeast quarter of section 15, township 1 north, range 10 west, with an exception not necessary to notice here; that said premises contain a large amount of valuable timber and stone; that defendants, without permission or authority from plaintiff, or any other person, have gone upon the land and destroyed and taken away large quantities of timber and stone, diverted the waters of a natural spring on said premises, and are destroying the beauty, usefulness and value of the premises; that the timber so taken amounts to more than 100,000 feet; and that more than 30,000 yards of soil and 2,500 tons of rock and stone have been removed; that by reason of the wrongful acts of defendants, plaintiff has been damaged in the sum of more than \$7,500; that defendants threaten to continue said trespass, and are actually engaged in so doing, to the injury of plaintiff; that the defendants have been repeatedly notified to cease trespassing upon said premises, but they refuse to do so; that the defendants are insolvent, and their acts and trespasses are continuous and committed by many insolvent persons, necessitating multifarious suits and actions by plaintiff to protect his rights, and that he has no plain, speedy or adequate remedy at law. Then follows a prayer for an injunction, an accounting and damages. The defendants Giebisch & Joplin, by answer, put in issue plaintiff's ownership in the property, admitted that it contained a stone quarry, but denied the value of the land for timber and all other allegations of the complaint, except as admitted by their further and separate answer. They also admitted that plaintiff, on May 19, 1914, notified them, for the first time, that he

claimed an interest in the premises. As a separate defense it was alleged that prior to the 29th day of October, 1913, the government of the United States had initiated the construction of a jetty at the entrance of Tillamook Bay, and that Major Morrow, the engineer in charge, had advertised for bids for furnishing and placing 400,000 tons of rock, in accordance with plans to be supplied by the government; that on the 29th day of October, 1913, George W. Kiger, claiming to be the owner of said premises, forwarded to Major Morrow the following proposition:

“Tillamook, Oregon, Oct. 29, 1913.

“Maj. Jay J. Morrow, Corps of Engineers, U. S. A.,
Portland, Oregon—

“Dear Sir: At the request of the members of the Bay City Port I am herewith dropping you a few lines in regard to rock that the commission thought might be suitable for jetty purposes. The land is located on the Miami River and is described as follows: The west half of the southwest quarter of section 14, township 1 north, range 10 west, and I have herewith agreed and offered to the above-named port stone or rock from the above-described land for one cent per ton for use in what is known as the north jetty of Tillamook Bay and the present jetty now in course of construction on the Nehalem Bay. Same offer is made to any contractor that may do this work or to the U. S. government. Said offer to remain good for six months from this date.

“Very respectfully yours,

“GEO. W. KIGER.”

It was further averred that thereupon said engineer placed said letter on file in his office, and permitted said prospective bidders upon the work to examine and use the same as a proposition upon which they could rely; that defendants, relying upon the offer submitted by Kiger as the owner of the property, and

after an examination of the premises, submitted a bid upon the basis thereof, and in making said bid figured and calculated that stone could be obtained from said premises at the price specified in said proposition; that said bid was accepted and defendants were awarded the contract for furnishing 400,000 tons of rock for said jetty; that immediately thereafter defendants visited the premises on two or three different occasions in company with George W. Kiger and discussed with him the proposition submitted by him to Major Morrow, who admitted that it was a *bona fide* proposition, and defendants verbally agreed with him that they would take all the rock required to fill the contract from the premises and pay him one cent per ton therefor, and that in the event any future contracts should be awarded to defendants for extensions or other jetties on said bay, four cents per ton for such additional rock; that Kiger then and there agreed to said proposition, and that a written contract should be drawn up, but that in the meantime the defendants might take possession and proceed with the development of said quarry and the arrangement of camps and machinery. The answer, which is very lengthy, goes on to show that defendants, relying upon Kiger's promise, proceeded with the development of the quarry, and expended in procuring rights of way, building a railway to it, and quarters for their employees, more than \$25,000, and alleges that, after these great expenditures had been made, Kiger refused to sign the contract and repudiated his agreement. Then follow allegations showing irreparable damage, and an allegation that plaintiff is, and was, when Kiger put defendants in possession, the owner of a one-half interest in the premises by a deed made

to him on March 9, 1913; that he was a resident of Tillamook, an office partner with Kiger, and knew of his proposition to Major Morrow and to these defendants, of the verbal agreement of Kiger with defendants, and of the large expenditures defendants were making for improvements and facilities for working the quarry; that he was also aware that defendants were dealing with Kiger as sole owner of the property, in ignorance of his own interest therein, and with such knowledge permitted the defendants to make these expenditures without notifying them of his "claim of ownership"; that his silence and failure to speak were done either with the purpose of deceiving, wronging and defrauding these defendants, or he was grossly negligent in not making known his interest in said premises to defendants; that defendants were at all times ignorant of the actual title and have been misled by the acts, silence and gross negligence of plaintiff; and that plaintiff ought to be and is estopped from questioning the rights of defendants in their possession of said premises. The plaintiff put all these matters in issue by a suitable reply, and thereafter, by order of the court, Kiger was made defendant and appeared, admitting every allegation of the complaint and adopting it as his answer in this cause. For a reply to the answer of Giebisch & Joplin, Kiger denied, among other matters, that he ever authorized defendants Giebisch & Joplin to take possession of said premises, but admitted that they were in possession of the northeast quarter of the southeast quarter of section 14, township 1 north, range 10 west, although he denied any collusion with plaintiff. The reply is too voluminous to be here inserted, but was sufficient to present a complete defense to all the

matters set forth in defendants' answer. On the trial it appeared that that portion of the tract which defendants claimed to be in possession of was incorrectly described, and defendants obtained leave to amend by inserting the true description, which appears hereinafter in the findings of the court. Upon the hearing the court made the following findings, conclusions and decree:

"This cause coming on regularly for trial herein on this the 30th day of November, 1914, at the hour of 10 o'clock A. M., and the trial having concluded on the 2d day of December, 1914, and after having heard all the evidence and argument of respective counsel, the court, being fully advised as to the facts and the law, as facts finds:

"I. That defendants A. Giebisch and F. Joplin are now, and have been during all the times mentioned in this complaint, partners, doing business under the name of Giebisch & Joplin.

"II. That the plaintiff and Geo. W. Kiger are the owners of the following described real property, situated in Tillamook County, Oregon, as tenants in common, each owning an undivided half interest therein: his undivided one-half interest in the northeast quarter of the southwest quarter and the west half of the southwest quarter of section 14, and the southeast quarter of the southeast quarter of section 15, in township 1 north, of range 10 west of the Willamette Meridian; excepting all the land in the southwest quarter of the southwest quarter of section 14, township 1 north, range 10 west, lying east of the Miami River, containing $7\frac{1}{2}$ acres, more or less, also excepting all the land in the northeast quarter of the southwest quarter of section 14, township 1 north, range 10 west, lying east of the Miami River, containing 4 acres, more or less; also excepting that portion of the southwest quarter of the southwest quarter and of the northeast quarter of the southwest quarter of section 14, township 1 north, of range 10 west, lying between the county road and the

Miami River. This deed is also made subject to the right of way of the county road as the same is located across the above-described land.

"III. That upon the northeast quarter of said premises there is situated and located a large quantity of rock, and that the defendants Giebisch & Joplin, who are partners, are quarrying rock therefrom for the purposes of using the quarried rock therefrom in the construction of a jetty for the United States government and the port of Bay City at the conjunction of Tillamook Bay and the Pacific Ocean.

"IV. That the said Kiger, prior to the purchase of an interest in the said premises by the said plaintiff, entered into a contract with the defendants Giebisch & Joplin, wherein and whereby they might take from said deposit of stone on said premises rock to be quarried by them at the rate of one cent per ton, government weight, for use in the construction of said jetty, and that said Kiger at said time, nor at any time, disclosed to said defendants that the said plaintiff had or had not acquired any interest in the said premises, or any part therein, and that the said defendants went into possession of the said quarry, opened up the same at an expenditure of about \$21,000, and have built a narrow-gauge railroad from Miami Spur in Tillamook County, Oregon, to the said quarry, at a great outlay of money and that after the work had been commenced by the said defendants, upon the opening of the said quarry, said Dwight acquired an undivided one-half interest therein, which he now owns.

"V. That the said Dwight, during all of said times, knew the said defendants had contracted with the said Kiger, as aforesaid, and at all times knew the said defendants were expending large sums of money opening said quarry, and that they were doing so for the purpose of constructing said jetty, and that said Dwight at no time notified them he had any interest in said premises, nor to desist from taking said stone therefrom, nor warned them to cease any operations at said quarry, or to cease the expenditure of money in the opening thereof, or the operating thereof, but passively

permitted them to proceed in the opening of the said quarry and in expending large sums of money in so doing.

“VI. That after a large amount of money had been expended in the opening of said quarry by the defendants, and same had been opened to a large extent, the plaintiff then notified the defendants Giebisch & Joplin to cease labors in connection therewith and to depart from the said premises.

“VII. That the said Kiger at all times consented, acquiesced in, and agreed with the defendants Giebisch & Joplin that they might proceed as they have been doing, as aforesaid.

“VIII. That all acts and things which the defendants Giebisch & Joplin have done in and about said rock quarry have been done under agreement and with the permission of the said Kiger with the knowledge of the said plaintiff.

“IX. That in order to remove the said stone it was necessary to tear away the soil above same and remove the trees and stumps, and that under the agreement with the said Kiger, the said defendants Giebisch & Joplin were to remove same at their expense, which they have done, and that there is no evidence before the court as to the amount of timber removed, and that the only attempt to produce any evidence as to the amount thereof was hearsay testimony of the plaintiff as to what some timber cruiser had told him, and the only other testimony is that of the defendant Giebisch as to what some party told him. Therefore the court will not find as to any quantity of timber removed in this cause.

“The court finds as conclusions of law that the defendants had a full, complete, valid and binding contract and agreement with Geo. W. Kiger, who has been brought in as a party to this suit, and who is a cotenant with the plaintiff, giving the defendants Giebisch & Joplin full authority and permission to remove rock from the said quarry, but the contract and agreement and permission did not convey any interest in the premises of the plaintiff and the said Kiger, and that if any

waste was committed it was committed by the defendant Kiger, as cotenant by reason of his contract and agreement with the defendants Giebisch & Joplin, and that the plaintiff has a full, plain and speedy remedy under the State of Oregon and against the defendant George W. Kiger, his cotenant; that the defendants Giebisch & Joplin are not trespassers by reason of having a permit from the defendant Geo. W. Kiger, a cotenant with the plaintiff; that the plaintiff by reason of his conduct and acts as set forth in the findings of fact, and as disclosed by the evidence in this cause, should be estopped from denying the defendants the right to take rock from the said quarry, and that the defendants Giebisch & Joplin should recover their costs and disbursements in this suit off of the plaintiff herein. * * Based on the findings of fact and conclusions of law, heretofore found and filed herein, it is at this time ordered, adjudged and decreed that the plaintiff has failed to prove facts sufficient to make out a *prima facie* case in his behalf herein, and that the suit be, and the same is, for that reason, hereby dismissed. It is further ordered, adjudged and decreed that the defendants Giebisch & Joplin recover off of and from the plaintiff herein their costs and disbursements taxed and allowed at \$——, and that execution may issue therefor. * * ”

From this decree plaintiff and Kiger appeal, and defendants also appeal from the failure of the court to decree specific performance as to Kiger and estoppel as to plaintiff.

MODIFIED. REHEARING DENIED.

For appellants there was a brief with oral arguments by *Mr. Sidney S. Johnson* and *Mr. Oak Nolan*.

For respondents there was a brief over the names of *Messrs. Stapleton & Sleight* and *Mr. H. T. Botts*, with an oral argument by *Mr. George W. Stapleton*.

MR. JUSTICE McBRIDE delivered the opinion of the court.

1. It is difficult to completely state the issues made on the pleadings on account of their great length, but the foregoing is deemed to present a general outline sufficient for the purposes of this case. While the testimony is contradictory in some particulars, a careful perusal of it satisfies us that the findings of the Circuit Court are justified in every particular. The proposition contained in the letter from Kiger to Major Morrow describes property not taken possession of by the defendants, but this was either an oversight and mistake on the part of Kiger, or a part of a scheme entered into by him and plaintiff to deceive persons who might be disposed to bid on the strength of the inducements there offered. The proposal originated in an investigation on the part of the officers of the city of the capabilities of the premises afterward occupied by defendants as a possible or prospective rock quarry. There was no mistake or misapprehension on the part of Kiger as to the actual physical location of the quarry. The officers of the port knew, and Kiger knew, that the particular piece of ground afterward occupied by Giebisch & Joplin was the one desired for the purposes of a quarry, and the fact that it was misdescribed in his original offer to Major Morrow can make no difference. There can be no doubt from the testimony that he encouraged these defendants to enter the property and expend a large sum of money upon the faith of his agreement to let them have rock for one cent per ton, with a promise that they would pay him a larger price, fixed by defendants' pleadings at four cents per ton, for rock taken for other possible contracts; and by the

plainest principles of equity he cannot now be heard to say that because the contract, through no fault of Giebisch & Joplin, was not reduced to writing, it should be treated as void. The defendants Giebisch & Joplin having entered upon the premises on the faith of Kiger's parol agreement and by his consent, and expended a large amount of money in opening the quarry, and having fully performed their part of the agreement, are not to be dispossessed because their agreement did not come up to the measure required by the statute of frauds: *Curtis v. La Grande Hydraulic Water Co.*, 20 Or. 34 (23 Pac. 808, 25 Pac. 378, 10 L. R. A. 484); *Kelsey v. Bertram*, 63 Or. 563 (127 Pac. 777), and cases there cited. So far, therefore, as the defendant Kiger is concerned, the findings of the court and the decree are correct, except that it does not go far enough and enjoin Kiger from in any way interfering with the possession of Giebisch & Joplin so long as they continue to carry out their contract and pay him one cent per ton for rock taken upon the instant contract and four cents for rock hereafter to be taken upon other contracts; and the decree should be corrected in that respect.

2. As to plaintiff we are disposed to adopt the theory of the learned judge below, who heard his testimony and was better able to judge of its credibility than are we. It is not going too far to say that much of it seems very improbable. He had been a business associate of Kiger for several years, being a tenant in common with him in at least two other parcels of realty. He occupied the same office with him, and their desks were not over four feet apart. They had the same stenographer, and it is evident that their relations, business and otherwise, were intimate. At the

time Kiger made the offer to Major Morrow plaintiff knew that he owned only a half interest in the land, and about the time that Kiger made his offer to Major Morrow, and during the time the officers of the Port of Bay City were investigating the facilities for obtaining rock for the jetty, he wrote and obtained an option to purchase the other undivided interest in the tract. This option was allowed to lapse, but after Giebisch & Joplin had entered upon the land and begun work and had expended money in preliminary work, rights of way, etc., he completed the purchase, and on March 9, 1914, put his deed upon record. He claims that he never consulted Kiger about the purchase, or informed him that he had an option on the property; that he never heard of any investigation of its capabilities as a quarry, nor discussed that subject with Kiger; that he never knew or heard of the proposal of Kiger to Major Morrow, or of any arrangement between Kiger and Giebisch & Joplin. In fact, he seemed to wish to impress the court with the idea that he supposed the tract was unoccupied, wild land, valuable only for timber until his purchase was completed. He goes so far as to state that he had never seen the land up to the time he bought it. Considering the intimate relations between himself and Kiger, his story is intrinsically improbable. That he would purchase a piece of land which he had never seen and never inquire of his associate, who he knew owned the other half, as to its value, the character of the soil, the amount and quality of the timber, and its other characteristics is not readily to be believed. In fact, the whole story is unlikely, and we are inclined to believe, as did the Circuit Court, that from the beginning there was a conspiracy between him and Kiger

to beguile Giebisch & Joplin into the belief that Kiger owned the whole property, and that when they had expended such a sum of money in opening up the quarry that it would cause them great financial loss to go elsewhere for stone, to extort from them a large price therefor; and the event shows that he carefully waited from March 9th, the date of his deed, until May 28th, allowing Giebisch & Joplin to go on with their improvements and expenditures in fancied security before he notified them of his claims to the property, while in the meantime his confederate, Kiger, was putting off the execution of the agreement with Giebisch & Joplin until they should get so deeply involved in the transaction that it would be ruinous to retreat. Neither of these men have any claims to relief in equity.

“Nothing,” observes Lord Camden, “can call forth this court into activity but conscience, good faith and reasonable diligence; where these are wanting, the court is passive, and does nothing”: *Smith v. Clay*, 5 Bro. Ch. Rep. 639.

All these are wanting in plaintiff's case. His conduct has been unconscionable, destitute of good faith, and wanting in diligence, and he is thereby estopped, so far as this case is concerned, to assert that Kiger was not the owner of the property; and his remedy, if any, is against his cotenant for his moiety of the royalties obtained from the sale of stone. Let a decree be entered accordingly.

MODIFIED. REHEARING DENIED.

MR. CHIEF JUSTICE MOORE, MR. JUSTICE BENSON and MR. JUSTICE BURNETT concur.

Argued June 8, affirmed July 6, on rehearing former opinion adhered to September 7, 1915.

KELLY v. WEAVER.*

(150 Pac. 166; 151 Pac. 463.)

Evidence—Opinion Evidence—Speed of Automobile.

1. Witnesses who have operated or had occasion to observe the velocity of automobiles may be permitted to give their opinion as to speed of an automobile which ran down and injured a person in a highway.

[As to when opinions of nonexperts are admissible, see note in 30 Am. St. Rep. 38.]

ON REHEARING.

Evidence—Judicial Notice—Laws of Nature.

2. While, under Section 729, subd. 8, L. O. L., declaring that judicial notice is taken of the laws of nature, the court may reject testimony irreconcilable with physical facts, conclusively established, or instruct that it be disregarded, it cannot do so as to reasonable testimony, where there is a question for the jury whether or not witness' means of observation were such as to entitle his testimony, as to what was the speed of an automobile, seen at some distance and for a comparatively short space, to be worthy of belief.

From Lane: LAWRENCE T. HARRIS, Judge.

Department 2. Statement by MR. CHIEF JUSTICE MOORE.

This action was instituted by William R. Kelly against A. W. Weaver and Albert Weaver to recover damages for a personal injury. The facts are that on January 7, 1914, about 6:30 in the evening, as the defendants were riding east in an automobile on the south side of Main street in Springfield, Oregon, they overtook and knocked down a horse on which the plaintiff was riding, breaking the latter's right leg and otherwise hurting him. The negligence alleged is:

“That at the time the automobile struck the plaintiff's horse, and immediately prior thereto, the defend-

*The admissibility of opinions as evidence of the speed of automobiles is discussed in note in 34 L. R. A. (N. S.) 778. REPORTER.

ants were driving the aforesaid automobile without giving warning, and in excess of 15 miles per hour, which was in violation of ordinance numbered 332 of the town of Springfield, Oregon”

—giving the title of the enactment and the dates of its passage and approval. The primary pleading further states:

“That the defendants did not signal to the plaintiff or warn the plaintiff that they were approaching him from the rear, as provided by said Ordinance 332 of the town of Springfield.”

The answer denied the material averments of the complaint, and alleged in effect that at the time the plaintiff was hurt, the horse which he was riding, becoming frightened at the headlight of an approaching trolley car, pranced, bringing his hind legs toward the middle of the street, thereby coming in contact with the defendants' automobile, and the injury complained of resulted from the plaintiff's contributory negligence. The reply put in issue the allegations of new matter in the answer, and, the cause being tried, resulted in a judgment against the defendants for the sum of \$3,000, and they appeal. After the appeal was perfected William R. Kelly died intestate, whereupon Arthur A. Kelly was duly appointed administrator of the decedent's estate, and, having qualified, he was substituted as plaintiff.

AFFIRMED. SUSTAINED ON REHEARING.

For appellants there was a brief over the names of *Messrs. Woodcock, Smith & Bryson* and *Mr. Lark Bilyeu*, with oral arguments by *Mr. A. C. Woodcock* and *Mr. Bilyeu*.

For respondent there was a brief over the names of *Mr. L. M. Travis, Mr. A. K. Meck and Messrs. Foster & Hamilton*, with an oral argument by *Mr. Travis*.

Opinion by MR. CHIEF JUSTICE MOORE.

1. It is maintained that an error was committed in permitting George Catching, over objection and exception, to testify as to the rate of speed at which the automobile was going immediately prior to the accident. It is argued that the testimony fails to show the witness was qualified to express the opinion which he declared. Mr. Catching testified:

That just before the accident occurred he was in Springfield, going south on Seventh Street toward and about 300 feet from Main Street, when he saw an automobile driven east on the latter street. Alluding to that machine, plaintiff's counsel asked: "How far did you see it on Main Street?" This witness replied: "Well, I didn't see it after it got past Seventh Street more than about 100 feet. Not more than 100 feet, because it was practically, well, it was dark out there. It was running in a dark, black place. You see it had left the arc-light. It passed by there."

Having stated that very soon thereafter he again saw the automobile on Main Street, between Eighth and Ninth, where the accident occurred, he was asked in reference to its passing Seventh Street:

"What speed was the automobile going when you saw it?

"A. I don't know how fast. * *

"Q. Do you know how fast the machine was going?

"A. Really, I don't know how fast the machine was going. * *

"Q. Do you know approximately how fast that automobile was going

"A. Well, I will tell you."

An objection was here interposed, on the ground, *inter alia*, that the witness was not qualified to answer the question, but, this having been overruled, he continued:

"Well, I would judge at the time it was running, well, it was going about between 20 and 25 miles an hour.

"Q. Did it continue at that speed as long as you saw it?

"A. I could not say as to that, because I turned my attention away as soon as he had went into the dark, and I couldn't tell whether he slacked up or not.

"Q. Did anything especially call your attention to that automobile at the time?

"A. Well, it was going along at a pretty lively gait was all.

"Q. Did that call your attention especially to the automobile at that time?

"A. Yes; that was the only thing."

On cross-examination the witness was asked, regarding the automobile, "You could not state as a matter of fact and you do not know how fast it was going?" He answered, "I am just guessing at it now.

"Q. It is all mere guesswork with you?

"A. Yes."

On redirect examination he was asked: "Have you ever ridden in a car where they had a gauge to tell how fast they were going?

"A. Yes.

"Q. So that you are able to judge something about the speed that the car was going? You would know what speed a car was going at?

"A. Well, I don't know under them conditions whether I would be or not.

"Q. What is your judgment, your best judgment, as you stood there and looked at the car; is it your best judgment that it was going at 20 to 25 miles an hour?"

An objection to the question, on the ground that it was leading, having been overruled, the witness replied: "I would judge it was going 20 to 25 miles an hour.

"Q. That is your best judgment?

"A. That is my best judgment of it at the time I saw it. I didn't know what it did do after that."

An exception to the general rule of expert evidence is the admissibility of testimony respecting the identity and appearance of persons and things, as to which facts, when personally observed by anyone of maturity and ordinary intelligence, he may express an opinion: *State v. Brown*, 28 Or. 147 (41 Pac. 1042); *First Nat. Bank v. Fire Assn.*, 33 Or. 172 (50 Pac. 568, 53 Pac. 8); *State v. Barrett*, 33 Or. 194 (54 Pac. 807); *Weiss v. Kohlhagen*, 58 Or. 144 (113 Pac. 46); *Kitchin v. Oregon Nursery Co.*, 65 Or. 20 (130 Pac. 408, 1133, 132 Pac. 956). Consonant with this recognized departure from the general rule, it was held in *Dugan v. Arthurs*, 230 Pa. 299 (79 Atl. 626, 34 L. R. A. (N. S.) 778), that a bystander, not possessed of technical or scientific knowledge, may give his opinion as to the speed of an automobile which runs down and injures a person in the highway. In deciding that case, the court says:

"The experience of nonexpert witnesses will enable them to form a reasonably accurate judgment as to the speed of a passing machine, and nothing beyond that is expected or should be required. Of course, the value and the weight to be given such testimony by the jury will, as in similar cases, depend upon the attention the witness has given the subject and the opportunities for observation which he may have had. His experience in such matters, however, goes to the weight, and not to the admissibility of his testimony. The witness is competent to express an opinion as to

the speed of the machine; it is for the jury to determine what weight they will give his testimony."

In *Wolfe v. Ives*, 83 Conn. 174 (76 Atl. 526, 19 Ann. Cas. 752), it was ruled that:

"An adult person of reasonable intelligence and ordinary experience in life, who just before an accident observed the passing automobile, the rapid speed of which is claimed to have caused the accident, is presumably capable, without proof of further qualification, to express an opinion as to how fast such automobile was going."

Persons who are accustomed to operate automobiles and have observed their velocity as indicated by speedometers can generally, without looking at such registering instrument, very accurately determine the rate of movement. So, too, police officers, a part of whose business is to apprehend violators of speed ordinances, from observing the movement of vehicles within a given distance when compared with the time required in passing over the intervening space, can very closely estimate the speed of an automobile by seeing it pass. Persons of the classes indicated are not always present at or immediately prior to a collision whereby an injury is inflicted that results in an action to recover damages for alleged negligence in operating an automobile and while other adults may not have enjoyed such opportunities for observing the rate of speed of such machines, they are nevertheless competent to express opinions on that subject, and though their estimates may be conjectural, they are admissible, the weight and value of their testimony being for the jury to determine.

The testimony of Mr. Catching was competent, and no error was committed in receiving it.

Other errors are assigned. They, however, are deemed immaterial.

It follows that the judgment should be affirmed, and it is so ordered. **AFFIRMED. REHEARING ALLOWED.**

MR. JUSTICE BEAN, MR. JUSTICE BENSON and MR. JUSTICE EAKIN CONCUR.

Former opinion adhered to September 7, 1915.

ON PETITION FOR REHEARING.

(151 Pac. 463.)

Messrs. Woodcock, Smith & Bryson, for the petition.

Mr. L. M. Travis, Mr. A. K. Meck and Messrs. Foster & Hamilton, contra.

Department 2. Opinion by MR. CHIEF JUSTICE MOORE.

2. In a petition for a rehearing it is insisted that, the witness George Catching having testified in effect that immediately prior to the accident he was in Springfield, Oregon, walking south on Seventh Street toward and about 300 feet from Main Street, when he saw an automobile driven east on the latter street, his sworn declaration shows he was too far from the passing car to enable him, in the space of 100 feet, in addition to the width of Seventh Street, to determine the speed of the vehicle, and, such being the case, an error was committed in permitting him, over objection and exception, to express an opinion on the subject.

A court will take judicial notice of the laws of nature: Section 729, subd. 8, L. O. L. Based on this

rule, it has been held that in an action to recover damages alleged to have been caused by the defendant's negligence, if the plaintiff's testimony is irreconcilable with physical facts, the existence of which are conclusively established, the court should instruct the jury not to consider such testimony: *Thompson, Trials* (2 ed.), § 2264; *Smitson v. Southern Pacific Co.*, 37 Or. 74 (60 Pac. 907); *Wolf v. City Ry. Co.*, 50 Or. 64 (85 Pac. 620, 91 Pac. 460, 15 Ann. Cas. 1181); *Payne v. Chicago etc. Ry. Co.*, 136 Mo. 562 (38 S. W. 308). The distance of the witness from the car when he saw it pass the space of his vision, the time the vehicle could possibly have been seen by him, and the amount of light then existing at that place, were factors from which to determine whether or not he could have so carefully observed the automobile as to enable him to state, in his opinion, how fast it was moving. If the evidence had disclosed that the witness was blind, or his sight impaired, or that at the time there was no light at the crossing, or that he was at such a distance from the car as to preclude the possibility of seeing it, the court might legally have excluded his testimony or directed the jury not to consider it. Catching's sworn statements, however, are reasonable, and it was the exclusive province of the jury to determine whether or not his means of observation were such as to entitle his testimony to be worthy of belief. Under the circumstances detailed, the court could not, as a matter of law, have excluded his testimony or instructed the jury not to consider it.

The former opinion is therefore adhered to.

AFFIRMED. APPROVED ON REHEARING.

MR. JUSTICE BEAN, MR. JUSTICE BENSON and MR. JUSTICE EAKIN CONCUR.

Motion to dismiss appeal argued September 1, denied September 8, 1914.

On the merits argued June 3, reversed June 29, rehearing denied September 7, 1915.

RAIHA v. COOS BAY COAL & FUEL CO.

(143 Pac. 892; 149 Pac. 940; 151 Pac. 471.)

Appeal and Error—Proceedings to Transfer Cause—Notice of Appeal.

1. Under Section 550, L. O. L., making a notice of appeal sufficient if it contains the title of the case, the names of the parties, and notifies the adverse party or his attorney that an appeal is taken from the judgment, a notice "that the above-named plaintiff appeals to the Supreme Court of this state from the judgment entered May 23d, in favor of the defendant, and appeals from whole of such judgment," is sufficient, where the transcript shows that, at a regular term of court in the county from which the appeal is taken, a judgment was rendered on May 23, 1914, between the parties named in the title of the case in favor of defendant.

ON THE MERITS.

Appeal and Error—Rulings on Evidence—Bill of Exceptions.

2. Under Section 171, L. O. L., providing that an objection shall be stated with so much of the evidence as is necessary to explain it, an exception to a ruling on evidence is not reviewable unless there is copied in the bill of exceptions so much of the testimony as will enable the court on appeal to understand the question involved.

Appeal and Error—Questions Reviewable—Rulings on Instructions—Bill of Exceptions.

3. Where an exception is taken to an instruction, which under the pleadings is improper under any view of the law, the error is reviewable, though no testimony is incorporated in the bill of exceptions.

Master and Servant—Injury to Servant—Employers' Liability Act—Applicability.

4. A complaint for injuries to a coal mine employee, which alleged that the employer was engaged in mining coal beneath the surface at such depth as to render the work inherently dangerous from accumulation of noxious and combustible gases, which might be guarded against by the exercise of reasonable care, that the employer failed to install ventilating fans and air shafts, and that by reason thereof the employee, on entering a room in the mine, was burned by an explosion, stated a cause of action under Employers' Liability Act (Laws 1911, p. 16), declaring that all persons having charge of, or responsible for, any work involving risk or danger to the employees shall use every device practicable, and providing that contributory negligence of the person injured shall not be a defense, so that a charge that an em-

ployee guilty of contributory negligence could not recover was erroneous.

[As to what is "accident arising out of and in course of employment," within the Employers' Liability Act, see note in *Ann. Cas.* 1914D, 1284.]

ON REHEARING.

Appeal and Error—Review—Presumption.

5. Where the bill of exceptions does not purport to contain all the evidence, and fails to state that none was offered on a particular issue, it will be presumed, from instructions given thereon, that they were predicated on evidence received thereon.

Negligence—Contributory Negligence—Apportioning Damages.

6. Contributory negligence is not a defense, under the Employers' Liability Act (Laws 1911, p. 16), to an action for a servant's injury, but is ground for apportioning the damages according to the respective want of care of the parties.

From Coos: JOHN S. COKE, Judge.

This is an action by Eino Raiha against the Coos Bay Coal & Fuel Company, a corporation, wherein judgment was rendered in favor of defendant, and plaintiff appeals. Respondent files motion to dismiss the appeal.

MOTION DENIED.

Mr. John D. Goss and *Mr. J. C. Kendall*, for the motion.

Mr. William T. Stoll and *Messrs. Brenn & Hyde*, *contra*.

MR. JUSTICE MOORE delivered the opinion of the court.

1. This is a motion to dismiss an appeal, and is based on the ground that the notice therefor does not sufficiently identify the judgment sought to be reviewed. Omitting the title of the court and cause, the names of the defendant and its attorneys who are addressed, and the names of the attorneys subscribed to the notice, it reads:

"You will please take notice that the above-named plaintiff (appellant) appeals to the Supreme Court of this state from the judgment entered May 23d, in favor of the defendant (respondent), and appeals from the whole of such judgment."

The transcript herein shows that a regular term of the Circuit Court of the State of Oregon for Coos County was held at the courthouse in that county, commencing April 27, 1914; the same being the fourth Monday in that month and the time fixed by law for holding such term, at which were present the trial judge and other officers.

"When on Saturday, the 23d day of May, 1914, the same being the twenty-second judicial day of said term of said court, the following proceedings, among others, were had, to wit: *Eino Raiha, Plaintiff, v. Coos Bay Coal & Fuel Company, Defendant*. No. 3840. Now, at this time the jury impaneled to try the above-entitled cause having returned their verdict in favor of the defendant and against the plaintiff, which verdict is received by the court and filed herein. On motion of defendant for judgment on such verdict, it is considered, ordered and adjudged that judgment be and the same is hereby rendered and given in favor of the defendant and against the plaintiff for its costs and disbursements. (Journal signed.)

"JOHN S. COKE,
"Judge."

The undertaking on appeal does not identify the judgment complained of with any greater particularity than the specification in the notice. The statute referring to the written means of initiating an appeal is in part as follows:

"Such notice shall be sufficient if it contains the title of the cause, the names of the parties, and notifies the adverse party or his attorney that an appeal is taken to the Supreme Court or Circuit Court, as the case

may be, from the judgment, order or decree, or some specified part thereof": Section 550, L. O. L.

It is admitted that the several requirements of the statute have been complied with, but it is maintained that the judgment is not adequately specified in the notice of appeal. Under the practice formerly prevailing in this court, a notice of appeal as indefinite as the one under consideration would probably be regarded as insufficient: *Crawford v. Wist*, 26 Or. 596 (39 Pac. 218); *Duffy v. McMahon*, 30 Or. 306 (47 Pac. 787); *Hamilton v. Butler*, 33 Or. 370 (54 Pac. 200). The later decisions, however, are to the effect that if, from an inspection of the notice of appeal it can be determined by fair construction or reasonable intentment, and without resort to evidence *aliunde* the transcript, that the appeal is taken from the judgment or decree in a particular case, it will be sufficient to confer jurisdiction of the cause: *Summers v. Geer*, 50 Or. 249 (85 Pac. 513, 93 Pac. 133); *Ferrari v. Beaver Hill Coal Co.*, 54 Or. 210 (94 Pac. 181, 95 Pac. 498, 102 Pac. 175, 1016); *Keady v. United Rys. Co.*, 57 Or. 325 (100 Pac. 658, 108 Pac. 197); *MacMahon v. Hull*, 63 Or. 133 (119 Pac. 348, 124 Pac. 474, 126 Pac. 3); *Holton v. Holton*, 64 Or. 290 (129 Pac. 532); *Fraley v. Hoban*, 69 Or. 180 (133 Pac. 1190).

An oral notice of appeal, given when the judgment or decree is rendered, is now sufficient to secure a transfer of the cause, if a proper undertaking be given and the transcript filed within the time limited therefor: Section 550, L. O. L. As consonant with this late enactment, the procedure that heretofore obtained, with respect to the manner of inaugurating an appeal, has been so modified as to avoid all technicalities, and a written notice is now held to be sufficient if it com-

plies with the requirements of the statute hereinbefore quoted, and, if from an inspection thereof the adverse party could not have been misled as to the order, judgment or decree undertaken to be reviewed.

Believing that the notice of appeal herein is adequate in these particulars, the motion to dismiss the appeal should be denied, and it is so ordered.

MOTION TO DISMISS DENIED.

Reversed June 29, 1915.

ON THE MERITS.

(149 Pac. 940.)

Department 1. Statement by MR. CHIEF JUSTICE MOORE.

This is an action to recover damages for a personal injury. The complaint charges, in effect, that the defendant is a corporation and engaged in mining coal beneath the earth's surface at such a depth as to render the work inherently dangerous on account of the liability of noxious and combustible gases to accumulate, which could have been guarded against by the exercise of reasonable care and diligence, and that the defendant failed to install in its mine sufficient ventilating fans and air shafts to dissipate such gases, by reason whereof the plaintiff, one of its employees, on November 17, 1913, on entering a room of the mine as directed, was severely burned and injured as a result of a violent explosion which just then occurred.

The answer denies the negligence alleged, and avers, in substance, that the plaintiff was supplied with a safety lamp which he was instructed to use on enter-

ing the chambers of the mine, but, disregarding the directions, he entered a coal-room with a lamp having an exposed flame, and by reason thereof a small explosion occurred, and he was slightly injured, which hurt resulted from his own contributory negligence. The reply having denied the allegations of new matter in the answer, the cause was tried, resulting in a verdict and judgment for the defendant, and the plaintiff appeals.

REVERSED. REHEARING DENIED.

For appellant there was a brief over the names of *Mr. Isham N. Smith, Mr. William T. Stoll and Messrs. Brenn & Hyde*, with an oral argument by *Mr. Smith*.

For respondents there was a brief over the names of *Mr. John D. Goss and Mr. J. C. Kendall*, with an oral argument by *Mr. Goss*.

Opinion by MR. CHIEF JUSTICE MOORE.

An exception having been taken by the plaintiff's counsel, it is contended that an error was committed in charging the jury as follows:

"The law provides that, notwithstanding the negligence or carelessness of the defendant, if the plaintiff himself has been guilty of contributory negligence, such negligence as proximately contributes to the injury, then the plaintiff cannot recover, notwithstanding the negligence of the defendant."

It is maintained by the defendant's counsel that, to entitle an exception to be considered on appeal, it must be separately stated in the bill of exceptions with so much of the evidence as is necessary to explain it (Section 171, L. O. L.); and, since no testimony is thus set forth, the question suggested is not properly before this court.

2. When an exception is taken to the ruling of a trial court upon the admission or exclusion of evidence, so much of the testimony as will enable the appellate court fully to understand the question involved must be copied in the bill of exceptions.

3. If, however, an exception relates to the giving of an instruction which under the pleadings would have been an improper application of the rules of law to the case, under any view that might be taken, the error will be reviewed on appeal, though no testimony is incorporated in the bill of exceptions: *Willis v. Horticultural Fire Relief*, 69 Or. 293 (137 Pac. 761, Ann. Cas. 1916A, 449).

4. Section 6 of the Employers' Liability Act reads:

"The contributory negligence of the person injured shall not be a defense, but may be taken into account by the jury in fixing the amount of the damage": Gen. Laws Or. 1911, c. 3.

The decisive question to be considered is whether or not the facts alleged in the complaint bring the cause of action within the provisions of the statute last cited. That enactment declares that all persons having charge of or responsible for any work involving risk or danger to the employees "shall use every device, care and precaution which it is practicable to use for the protection and safety of life and limb": *Id.*, § 1. It will be remembered the complaint alleges that the work in which the plaintiff, as an employee of the defendant, was engaged when he was injured, was intrinsically dangerous. No evidence is before us from which the degree of danger to which the plaintiff was exposed can readily be determined, but from a mere inspection of the averments of the complaint it is believed the cause of action set forth therein brings it

within the provisions of the act mentioned: *Dorn v. Clarke-Woodward Drug Co.*, 65 Or. 516 (133 Pac. 351); *Schulte v. Pacific Paper Co.*, 67 Or. 334 (135 Pac. 527, 136 Pac. 5); *Dunn v. Orchard Co.*, 68 Or. 97 (136 Pac. 872); *Wasiljeff v. Hawley Paper Co.*, 68 Or. 487 (137 Pac. 755); *Browning v. Smiley-Lampert Lumber Co.*, 68 Or. 502 (137 Pac. 777.)

An error was committed in giving the instruction complained of.

The judgment is therefore reversed and a new trial ordered. REVERSED. REHEARING DENIED.

MR. JUSTICE BURNETT, MR. JUSTICE EAKIN and MR. JUSTICE MCBRIDE concur.

Denied September 7, 1915.

ON PETITION FOR REHEARING.

(151 Pac. 471.)

Mr. John D. Goss and Mr. J. C. Kendall, for the motion.

Mr. Isham N. Smith, Mr. William T. Stoll and Messrs. Brenn & Hyde, contra.

Opinion by MR. CHIEF JUSTICE MOORE.

It is contended in a petition for a rehearing that a reversal of the judgment herein was erroneously based on the giving of an instruction on the question of contributory negligence, when the bill of exceptions does not purport to contain any of the testimony, and for that reason it cannot be said from

an inspection of the transcript that the plaintiff's right of recovery is founded on the Employers' Liability Act, under which statute alone contributory negligence is not a defense: Gen. Laws Or. 1911, c. 3, § 6; *Schaedler v. Columbia Contract Co.*, 67 Or. 412 (135 Pac. 536).

5. When a bill of exceptions does not purport to contain the evidence, and fails to state that no testimony was offered on a particular issue, it will be presumed, from instructions given in respect to facts disputed by the pleadings, that such parts of the charge were predicated on testimony that had been received: *Baker County v. Huntington*, 48 Or. 593 (87 Pac. 1036, 89 Pac. 144). In the charge it was said:

"It is the duty of the master operating a mine to use all appliances readily obtainable * * for the prevention of accidents arising from the accumulation of gases or other explosives, and failure to observe that duty by the master constitutes negligence on his part."

The court further instructed as follows:

"It is incumbent upon the defendant to make out the better case as to the affirmative defenses, providing the plaintiff has first of all established by preponderance of the evidence that he received his injury by reason of the carelessness or negligence of the defendant in the particulars, or some of the particulars, as described in the complaint."

From these excerpts and others of like import the court conceded that testimony had been given by the plaintiff tending to show that he was hurt by an explosion of gas in the defendant's coal mine, as alleged in the complaint. The facts thus appearing from an inspection of the bill of exceptions, as evidenced by the language last quoted, prove that the cause of action arose under the statute referred to, and not under the principles of the common law.

6. By the act mentioned, though contributory negligence is not a bar to a recovery of damages by an employee for an injury resulting from the alleged carelessness of the master, the measure of the loss occasioned by the hurt is apportioned ratably between the parties according to their respective want of ordinary care: *Filkins v. Portland Lumber Co.*, 71 Or. 249 (142 Pac. 578).

The former opinion is therefore adhered to.

ON REHEARING FORMER OPINION APPROVED.

Argued July 2, modified September 7, 1915.

JONES v. SHEFLER.

(151 Pac. 463.)

Mortgages—Title of Grantee in Deed Constituting a Mortgage—Evidence.

1. Evidence *held* to justify a finding that the grantee in a deed intended as a mortgage acquired by purchase the absolute title to the property.

Principal and Agent—Liability of Agent—Evidence.

2. Defendant suggested to plaintiff that he should exchange his farms D. and F. for the property of a third person. Plaintiff gave his consent to defendant attempting to make an exchange, and recognized defendant as his agent, acting in the capacity of real estate broker. Defendant testified that he worked the deal through. By fraud, the farm D. was conveyed to a third person for the benefit of defendant. *Held*, that defendant was the agent of plaintiff, and he could not retain the benefit of the conveyance as against plaintiff, who was not materially injured because he transferred what he was willing to transfer in exchange for the property of the third person.

Deeds—Fraud—Evidence—Sufficiency.

3. Evidence *held* to justify a finding that a deed was procured by fraud.

Deeds—Fraud—Ratification—Evidence.

4. Evidence *held* not to justify a finding that a grantor, induced by fraud to execute a deed, ratified the conveyance, so as to prevent him from suing to set it aside for the fraud.

Cancellation of Instruments—Relief—Recovery for Improvements.

5. A grantor, induced by fraud to execute a deed to a grantee for the benefit of a third person, promised the third person to compensate him for improvements made on the property, though such person was the principal in the fraud. *Held*, that the grantor, suing to set aside the deed for the fraud, must, on obtaining relief, compensate the third person for the improvements.

[As to when the vendor may recover possession of real estate from the purchaser, see note in 107 Am. St. Rep. 722.]

Cancellation of Instruments—Suit to Set Aside Deed—Conditions.

6. A grantor, suing to set aside a deed for fraud, subsequent to the grantee therein executing a note and mortgage on the property to a third person, who in his complaint alleges that he brings in such note and mortgage subject to the order of the court, must, to obtain relief, procure the cancellation and surrender of the note, or satisfy any judgment procured thereon, as he is not entitled both to the property and the mortgage thereon.

From Marion: WILLIAM GALLOWAY, Judge.

Department 2. Statement by MR. JUSTICE HARRIS.

The plaintiff, M. L. Jones, was the record owner of two tracts of land in Marion County, one of which embraced about 746 acres and the other about 500 acres. For the sake of convenience the 746-acre tract will be designated as the Durbin farm and the 500-acre tract will be called the Fairfield farm. R. A. Proudfoot was the owner of property in Portland, Multnomah County, which will be referred to as the Peer Hotel. The lands owned by Jones were mortgaged for \$25,000, and the Peer Hotel was encumbered with a mortgage for \$35,000. J. W. Grussi and C. E. Bolds were real estate brokers doing business in Portland under the firm name of Grussi & Bolds. The defendant George C. Shefler was employed by Grussi & Bolds, and had full charge of their farm and exchange department. The defendant F. J. Eldriedge had for many years been on terms of intimate friendship with the plaintiff. The defendant Swastika Farms Company is a corporation, which was organized June 13, 1912, and for all prac-

tical purposes is the *alter ego* of Eldriedge, who soon after the incorporation of the company conveyed to it all his interest in the Durbin farm. J. H. Cummings is a near relative of Shefler, and is the holder of a mortgage for \$1,875 on the Durbin farm, pretended to have been given by Shefler in May, 1912. J. C. Wolfe is the lessee of a portion of the premises from Shefler. On January 30, 1912, E. P. Lundy was holding the Durbin farm from year to year as the tenant of Jones. On January 30, 1912, the plaintiff, M. L. Jones, and the defendant Geo. C. Shefler entered into a written agreement which, so far as material to this discussion, recites:

“This agreement, made this 30th day of January, 1912, between M. L. Jones, the first party, and Geo. C. Shefler, the second party, witnesseth: The first party, on the conditions hereinafter named, hereby sells, and agrees to convey by good and sufficient warranty deed, to the second party, the following described real property, to wit: [Describing the Durbin farm and the Fairfield farm.] The consideration of this sale is the sum of \$125,000. The second party, on the conditions hereinafter named, hereby sells and agrees to convey unto the first party, by good and sufficient warranty deed, the following described real property: [Describing the Peer Hotel]—at and for the sum of \$125,000. Each party agrees to furnish to the other, within three days from the date hereof, an abstract of title showing, respectively, a fee-simple title free of encumbrances, except that a certain mortgage upon the real property agreed by the second party to be conveyed to the first party for \$35,000, given to the Oregon Trust Company and assigned to the heir or heirs of H. W. Scott, is excepted, and also a mortgage of \$25,000 given by the first party on his lands and to be discharged as hereinafter stated. Deeds of conveyance shall be executed by each party to the other, or to such party or parties as the other shall designate,

within two days from date thereof, and placed in escrow in the United States National Bank, Salem, Oregon, subject to the approval of title by the parties and the consummation of the respective engagements of the parties as herein stipulated. The first party is to pay and discharge the mortgage of \$25,000 payable to Hoefer and Zorn, now an encumbrance on his property, within three days, and send the release of mortgage to the owner of said mortgage at Guthrie, Oklahoma, for his execution, depositing the money in said bank payable to his order on the receipt of said release by said bank. The second party takes the said two tracts of land owned by the first party subject to the rental contracts thereon for the year 1912, and subject also to a certain hop contract now outstanding, covering the hops grown thereon in the year 1912; he receiving the landlord's rent. The first party buys the property agreed to be conveyed by the second party subject to a certain lease thereon to the Star Brewery Company, and a lease to the Portland Bakery Company; he receiving appropriate assignments of said leases by the second party upon the passing of deed. The second party is to give the first party a mortgage for \$35,000 upon the tract of land of 750 acres first above described payable two years from date thereof at 8 per cent per annum, said mortgage to be executed and delivery of note and mortgage is to be made at the time of passing deeds. Should the second party at any time during the continuance of said mortgage make sale of a portion or portions of said tract, a proportional release of the mortgage shall be made by the first party on any tract sold. * * The second party is to furnish the first party all blueprints, estimates and construction contracts relative to the construction of the building on said lots 5 and 6, called the Peer Hotel; the first party to have reasonable time to examine the same as to cost of construction. * * "

Having signified their willingness to close the transaction, Proudfoot, Shefler and Eldriedge met at the

bank on February 23, 1912, and consummated the agreement. A deed dated January 31, 1912, signed by R. A. Proudfoot and wife, conveying the Peer Hotel, subject to a mortgage of \$35,000, to Ilda E. Jones, Gertrude V. Jones, Mrs. G. W. Gray and Mrs. A. M. Cannon, daughters of the plaintiff, was delivered to Jones. A deed, signed by Jones and wife, and conveying the Fairfield farm to Proudfoot was received by the latter. Shefler received a deed which conveyed to him the Durbin farm, and a note signed by Shefler and wife for \$35,000, which was secured by a mortgage on the Durbin farm, was delivered to Jones. The deeds and the mortgage were recorded.

Claiming that Eldriedge was his agent, and that the deed to Shefler was induced by fraud, the plaintiff on July 26, 1912, commenced this suit for the purpose of setting aside the conveyance of the Durbin farm. The complaint alleges that Eldriedge came to plaintiff and solicited the privilege as plaintiff's agent of effecting an exchange of properties, and that for a certain consideration Jones employed Eldriedge as agent to conduct the necessary negotiations with Proudfoot for the accomplishing of the exchange; that Proudfoot was willing to exchange the hotel, subject to the \$35,000 mortgage, for the Fairfield farm alone; that with full knowledge of the terms upon which Proudfoot was willing to trade, and knowing that Jones was not aware of the conditions upon which Proudfoot would exchange properties, Shefler and Eldriedge conspired together for the purpose of defrauding Jones out of the Durbin farm; that in furtherance of the fraudulent design Shefler and Eldriedge represented that Jones would be required to convey free from encumbrance both the Durbin

and Fairfield farms in exchange for the Peer Hotel; that Shefler was a person of large financial interests, and as such held large claims against Proudfoot; that the demands held by Shefler were of such considerable extent that the Peer Hotel was under the immediate direction and control of Shefler; that as a result of the proposed exchange Proudfoot would only acquire the Fairfield farm, which was equal in value to all the equity that remained to Proudfoot in the hotel, and that the Durbin farm would have to be deeded to Shefler to satisfy the claims held by Shefler and his associates against Proudfoot; that the representations were false; that, relying upon the statements made by Shefler and Eldriedge, the plaintiff deeded the Fairfield farm to Proudfoot and conveyed the Durbin farm to Shefler, who was employed by and acting as the agent of Eldriedge. The complaint concludes with a prayer that Jones be decreed to be the owner of the Durbin farm, that the mortgage from Shefler to Cummings be canceled, that the deed from Eldriedge to the Swastika Farms Company be annulled, and for equitable relief.

The defendant Shefler answered by denying the charge of fraud, and alleging that Eldriedge does not own any interest in the Durbin farm, and that the Swastika Farms Company wrongfully claims to own the land. For a separate answer Shefler alleges that the Peer Hotel was worth \$125,000, and that the Durbin and Fairfield farms were together of the value of \$125,000, and that the plaintiff agreed to and did trade the two farms for the Peer Hotel; that the plaintiff was to convey the farms to such persons as might be named by Shefler, who likewise was to transfer the hotel to such persons as Jones might designate; that

deeds were executed and delivered pursuant to the agreement; that Jones relied upon his own judgment, after a personal inspection of the Peer Hotel, and was not deceived or defrauded by Shefler. The answer filed by Shefler further avers that immediately preceding the commencement of this suit Eldriedge and Jones conspired together to defraud Shefler out of the Durbin farm. Shefler asks for a decree declaring him to be the owner of the land, and that the clouds created by the plaintiff and other defendants be removed. Eldriedge and the Swastika Farms Company answered jointly. They deny the accusations of fraud made by Jones in the complaint, and assert that Shefler was acting as agent and trustee for Eldriedge, and that Shefler wrongfully claims to own the land.

For a separate answer to the complaint Eldriedge and the Swastika Farms Company aver that, while the title to the Fairfield farm appeared of record in the name of Jones, the fact was that Eldriedge owned an undivided one-half interest in that property; that, while the deeds purported to convey all the Fairfield farm to Jones, they were only intended to convey an undivided half in fee, and to operate as a mortgage on the other one-half interest to secure certain advances made by Jones to Eldriedge, and amounting to about \$15,000 on January 30, 1912; that having learned that Proudfoot desired to exchange the Peer Hotel for acreage, Eldriedge communicated the information to Jones, who inspected the Peer Hotel, and, having decided that it was worth \$120,000, he expressed a willingness to trade by giving for the Peer Hotel the Durbin farm, valued at \$90 per acre, and the undivided one-half of the Fairfield farm, valued at \$22,500, and to cancel the indebtedness which

Jones held against Eldriedge in the sum of \$15,000; that afterward, in exchange for the Peer Hotel, Jones conveyed the Fairfield farm to Proudfoot, and to Shefler, who had been employed by Eldriedge to aid in closing the trade, the Durbin farm was deeded in trust for Eldriedge, while the debt due from Eldriedge to Jones was, as a part of the consideration for the exchange, wiped out and canceled. It is further averred that at the time of conveying the Durbin farm Jones knew that the title was taken by Shefler in trust for Eldriedge, for the reason that Shefler had represented to Eldriedge that the former could through eastern connections furnish the necessary money to enable Eldriedge to improve the land, and that Shefler would advance moneys to the amount of \$10,000. It is also set forth that, immediately after the trade was closed, Eldriedge, with the knowledge and consent of Jones, paid Lundy \$1,000 for a cancellation of the lease held by Lundy, and that Eldriedge then went upon the premises and made improvements valued at \$6,000. Eldriedge and the Swastika Farms Company further alleged that Jones ratified the conveyance of the Durbin farm to Shefler, because in June, 1912, Jones loaned to Eldriedge \$1,000, and took as security shares of stock in the Swastika Farms Company, and also because in April, 1912, Eldriedge made application to Jones for a loan of \$5,000, and with the understanding that the farm would be mortgaged to secure such loan the plaintiff by indorsement procured for the use of Eldriedge the sum of \$5,000, which the latter secured by causing Shefler to execute a mortgage on the farm. For the purpose of obtaining affirmative relief against Shefler, it is alleged in the answer of Eldriedge and Swastika Farms Com-

pany that Shefler had been employed and paid \$1,250 by Eldriedge for assisting in bringing about the exchange of properties, and that the Durbin farm was conveyed to Shefler in trust for Eldriedge, the former agreeing to advance \$10,000 to enable the latter to improve the land; that Eldriedge has since conveyed all his interest to the Swastika Farms Company; and that Shefler has failed to comply with the demand of the corporation to convey the land to it. The answer prays that Shefler be decreed the trustee of the Swastika Farms Company, and that he be required to transfer the land to the corporation, and that the Cummings mortgage be canceled.

By appropriate replies the plaintiff traversed the defenses set up by the answering defendants. Lundy and Cummings made no appearance. The trial commenced December 15, 1913, and on February 27, 1914, terminated in a decree which cancels the deed from Jones to Shefler, annuls the conveyance from Eldriedge to the Swastika Farms Company, sets aside the mortgage from Shefler to Cummings, and awards to the Swastika Farms Company a judgment against Jones for \$11,000, on the theory that Eldriedge had paid to Proudfoot the sum of \$5,000 as a part of the consideration for the exchange of the properties, improvements to the extent of \$6,000 had been made, and a commission of \$5,000 should be paid by Jones; the three sums aggregating \$16,000, from which \$5,000, the amount of the loan procured by Jones, was deducted, leaving a balance of \$11,000. The plaintiff appealed from that portion of the decree which awarded a judgment against him. Shefler did not appeal, but Eldriedge and the Swastika Farms Company appealed from the whole decree. **MODIFIED.**

For appellant there was a brief over the names of *Mr. John H. McNary* and *Mr. A. M. Cannon*, with an oral argument by *Mr. McNary*.

For respondents there was a brief over the name of *Messrs. Murphy, Conley & Deneffe*, with oral arguments by *Mr. Arthur A. Murphy* and *Mr. J. A. Conley*.

MR. JUSTICE HARRIS delivered the opinion of the court.

Briefly stated, the facts present a situation where Proudfoot owned the Peer Hotel and Jones possessed two farms, one of which is called the Durbin farm and the other is known as the Fairfield farm; Proudfoot deeded the hotel to Jones, with an encumbrance of \$35,000. Jones transferred the Fairfield farm to Proudfoot, and conveyed the Durbin farm to Shefler, who then gave to Jones a note for \$35,000, secured by a mortgage on the land. As we read the complaint, the version as given by the plaintiff is that Eldriedge was acting as the agent of Jones, and Shefler was employed by Eldriedge. One farm was conveyed to Proudfoot, and one to Shefler, with the belief that the Fairfield farm paid Proudfoot for his remaining equity in the hotel, and the Durbin farm satisfied the large claims held by Shefler against Proudfoot and the hotel, when in truth Shefler did not hold any claims at all against Proudfoot, and the Durbin farm was therefore fraudulently acquired by Shefler for the benefit of Eldriedge, who was at all times the agent of Jones. This suit in no way affects the transfer of the Fairfield farm to Proudfoot, and the only land involved in the litigation is the Durbin farm.

Epitomizing the story told by Shefler in his answer: He claims to be owner of the land, denies that El-

driedge possesses any interest entitled to recognition and rests his claim of ownership on the ground that he made a contract with Jones, who, after making a personal inspection of the hotel property, conveyed only that which he agreed to convey, and received all that he contracted for, and that therefore Jones was not injured. Eldriedge and the Swastika Farms Company plead their claim to the land by asserting that, while Jones had a deed to the Fairfield farm, he only owned an undivided one half of that property, and held the other half as security for about \$15,000 which Eldriedge owed him; that Jones conveyed the Fairfield farm to Proudfoot free from encumbrance, and paid Eldriedge for his equity in that property by transferring the Durbin farm to Shefler for the benefit of Eldriedge, and then taking a mortgage back for \$35,000. Eldriedge accounts for the deed being made to Shefler by saying that the latter was to advance to the former \$10,000, which Eldriedge planned to use in the improvement of the property. Eldriedge and the Swastika Farms Company further contend that, regardless of whether the transaction was fraudulent or honest, Jones ought not to be permitted to accuse Shefler and Eldriedge of wrongdoing, because with a full knowledge of all the facts (a) Jones procured a loan of \$5,000 for Eldriedge and as security took a mortgage on the farm; (b) Jones loaned to Eldriedge \$1,000, and received shares of stock in the Swastika Farms Company to secure the loan; and (c) Eldriedge and his grantee the corporation made improvements to the amount of \$6,000.

A recital of the conflicting claims of the litigants at once reveals that the plaintiff's right to relief depends upon whether Eldriedge was his agent; that Eldriedge

predicates his claims upon the contention that he had an equity in the Fairfield farm, and that Jones held the title to an undivided half to secure an indebtedness; and that Shefler simply stands on the agreement with Jones, and fortifies himself behind the assertion that Jones looked at the hotel, and then gave all, but not more, than he agreed to give, and received all that was promised to him.

1. The question first demanding attention concerns the claim made by Eldriedge that Jones held the legal title to one half of the Fairfield farm to secure an indebtedness of about \$15,000. If Edriedge had an equity in the property conveyed to Proudfoot, then he has laid a substantial foundation for his contention that the Durbin farm, subject to the \$35,000 mortgage, paid for his equity in the Fairfield farm; but if he had in fact sold all his interest to Jones, and if it was understood by the parties that Jones did not hold the title as security only, then the very basis of the contention made by Eldriedge is swept away, while the position of Jones is materially strengthened. We shall therefore relate some of the transactions involving the Fairfield farm. Eldriedge had been litigating with John Hoefer and Casper Zorn over the Fairfield farm and a tract of 228 acres known as the Waconda farm (see *Eldriedge v. Hoefer*, 52 Or. 241 (93 Pac. 246, 94 Pac. 563, 96 Pac. 1105)), during which time Jones had advanced money to Eldriedge, and for the purpose of securing the advances already made as well as such as might subsequently be furnished, Eldriedge executed a quitclaim deed on April 11, 1908, conveying to Jones all interest in the Fairfield and Waconda farms. On January 16, 1909, Eldriedge executed and delivered to Jones an instrument referred

to in the transcript of testimony as the confirmatory deed. After reciting that the quitclaim deed was intended as a mortgage, the confirmatory deed reads thus:

“Whereas, the said M. L. Jones, in addition to the sums of money loaned to me as aforesaid, has lately paid, satisfied and discharged an indebtedness owing by me to divers and sundry persons, and has assumed and become obligated to pay said indebtedness to the said John Hoefer and Casper Zorn, and made additional loans and advances to me, all as payments on an agreed purchase price of said lands, and all sufficient in amount to equal the value of my interests in the said lands hereinbefore described, under an agreement that all my right, title, interest and estate, both legal and equitable, and particularly my equity of redemption in and to said above-described lands, and every part and parcel thereof, should absolutely pass to and vest in said M. L. Jones, by virtue of the conveyance to him of August 21, 1908, divested of all claims to ownership or equity of redemption therein by me, and under the further agreement that said deed of August 21, 1908, should be supplemented by my acknowledgment and confirmation of the same as such absolute deed of conveyance by deed of confirmation executed according to the usual formalities of the law: Now, therefore, I, the said Freeman J. Eldriedge aforesaid, in fulfillment of the foregoing promises, considerations and agreements, do hereby grant, bargain, sell, remise, release, convey and confirm unto the said M. L. Jones by my said deed of quitclaim executed and delivered to him on the 21st day of August, 1908, as aforesaid, as well as by these presents, all my right, title, interests and estate, both legal and equitable, and all my equity of redemption from any and all persons whomsoever, in and to the above-described lands, tenements and hereditaments, and every part and parcel thereof, to have and to hold the same unto the said M. L. Jones, his heirs and assigns,

forever, divested of all claim or claims of ownership, present or remote, absolute or contingent, by me, and I hereby direct the said John Hoefer and Casper Zorn to convey the legal title to said lands to the said M. L. Jones."

Jones claims that it was agreed that the confirmatory deed was to pass the absolute title to all the Fairfield farm on the basis of \$70 per acre, making \$35,000 as the purchase price of the 500 acres. Eldriedge contends that the confirmatory deed was designed to convey to Jones an undivided one half of the Fairfield farm in payment of \$17,500 of the indebtedness, and the other undivided one half was to be held as security for such indebtedness as remained over and above the \$17,500. Both Jones and Eldriedge state that the land agreed to be conveyed to Jones was figured at \$70 per acre, but they are not agreed upon how much interest in the land was transferred to Jones. On the day of the execution of the deed, but before it was signed, a memorandum was prepared showing the moneys previously paid by Jones, as well as debts due from Eldriedge to third parties, aggregating \$33,313.33. The memorandum is in evidence, and it shows that Eldriedge over his signature authorized Jones to pay the outstanding indebtedness, which included \$24,671.90 due Hoefer and Zorn, and to credit the payments "on the purchase price of the Eldriedge Fairfield farm." This identical memorandum shows that the parties figured \$1,686.67 as the difference between \$35,000 and \$33,313.33. Eldriedge having stated that he wanted a chance to get half of the Fairfield farm back, Jones told him that he would give a writing by which Eldriedge could purchase half for \$17,500; and such an instrument was accordingly prepared, but was not signed, because Eldriedge

preferred not to do so, whereupon Jones told Eldriedge that if within a reasonable time the latter produced \$17,500 he could have half of the place. Jones paid all the indebtedness, aggregating \$33,313.33, and went into possession of the premises. Jones went to Portland on June 8, 1909, at the request of Eldriedge, and found him confined to his room with illness. Eldriedge wanted the balance due on the Fairfield farm, whereupon Jones gave his note for \$1,686.67, to the former, who in turn signed and gave to Jones a writing as follows:

“Portland, Oregon, June 8, 1909.

“Received from M. L. Jones \$1,686.67, balance due on purchase price of Eldriedge Fairfield farm of 500 acres, and verbal option to purchase only part of said farm is hereby canceled.

“F. J. ELDRIEDGE.”

Attached to this writing is a sheet of paper, upon which appears an itemized list of the sums paid by Jones, aggregating \$33,313.33, and also showing that for the second time the parties figured \$1,686.67 as the difference between \$35,000, the purchase price of 500 acres at \$70 per acre, and \$33,313.33, the total amount already paid. It is true that Eldriedge testified that the amounts figured were too large, but this contention is not entitled to any consideration.

It is possible that different persons might disagree as to the legal effect of the quitclaim and confirmatory deeds, when considered in connection with the contemporaneous oral agreements; but, if the testimony of sworn witnesses and what appear to be irrefutable writings can be relied upon at all, it would seem that there could be no escape from the conclusion that both Jones and Eldriedge understood that the confirmatory deed passed an absolute title to all the Fairfield

farm, especially when supplemented by an understanding that the transaction was completely closed when the note was given on June 8, 1909. The writing which was prepared, but not signed, when the confirmatory deed was delivered, affirmed that Jones held the Waconda farm in trust for Eldriedge, and at the same time, recognized that Jones had purchased all the Fairfield farm. Jones never at any time claimed to own the Waconda farm, and until the execution of the confirmatory deed held both farms as security for the debts paid by him for Eldriedge; but, when Eldriedge's indebtedness to Jones had been paid by the conveyance of the Fairfield farm, the latter no longer claimed any interest in the Waconda farm, and the fact that Jones, without the payment of any consideration, conveyed the Waconda farm on June 17, 1909, to Ben W. Olcott, for the purpose of securing certain advances made by Olcott to Eldriedge, strengthens rather than weakens the claim of Jones that he had purchased all the Fairfield farm, because otherwise, in all probability, he would have been inclined to retain some claim to the Waconda farm as additional security.

It is true that Eldriedge told J. W. Grussi and C. E. Bolds that he had an equity in the Fairfield farm. While Jones denies making the statements, the evidence shows that in June, 1912, at three different places, he either made evasive statements or admitted that Eldriedge had possessed an interest in the Fairfield farm. On these occasions, however, it was thought that Shefler could be persuaded to relinquish his claim to the land by convincing him that Eldriedge had had some interest in the 500 acres conveyed to Proudfoot. Both Eldriedge and Jones might have

considered that the option to repurchase, verbally given to Eldriedge, vested some interest in him, and so, too, Cannon may have had the same idea when suggesting that a suit would be necessary to divest Eldriedge of all interest. Shefler concedes that at an earlier date, and after the \$5,000 loan was made, Jones told him, in answer to a direct question, that Eldriedge did not own an equity in the Fairfield farm. It is not reasonable to believe that either Eldriedge or Jones ever thought that the former had anything more than a right to repurchase, because the conduct of the parties, their declarations to each other, and the convincing writings all point to the conclusion that the payments made by Jones were recognized and intended to operate as a purchase of the absolute title to all the 500 acres. The very foundation of the claim made by Eldriedge is that Jones only owned half and held the other half as security; and when the essence of his contention is conclusively disproved, not much remains for him to stand upon.

2. The next phase of the case presented for consideration is the question of agency. Eldriedge is the person who suggested to Jones that he exchange his farms for the Peer Hotel. In January, 1912, Eldriedge asked Jones if he would trade his two farms for the hotel, and the former stated that he thought he could negotiate a transfer. Eldriedge declared that he would not expect any commission directly out of the exchange, but he would be satisfied if Jones would agree to permit him to exchange the hotel, when acquired by Jones, for \$100,000 in cash and \$100,000 in timber lands, the deal for which he said was practically made and could be consummated before the fall of the year, and out of which he wanted a fourth of the

profit. Jones gave his consent, and from that time on recognized and regarded Eldriedge as his agent, acting in the capacity of a real estate broker. Eldriedge testified: "I think I worked the whole deal through." On these facts Eldriedge cannot retain the land conveyed to Shefler, if Jones did not know that such conveyance was designed by Shefler and Eldriedge to be for the benefit of the latter; and it would make no difference that Jones was not materially injured, because of having transferred exactly what he was willing to give for the hotel: *McNiel v. Holmes, ante*, p. 165 (150 Pac. 255).

3. The next inquiry is whether Jones knew that the deed to Shefler was for the use of Eldriedge, and whether Jones was the victim of fraudulent practices. Proudfoot, who died before the time of that trial, received for his hotel the Fairfield farm, and nothing more. He was willing to trade, and did exchange, his hotel, subject to the \$35,000 mortgage, for the Fairfield farm and he received nothing more. Eldriedge claims to have paid \$5,000 to Proudfoot; but he did not even attempt to account for a written agreement which he asserted was made with Proudfoot. He produced no receipt from Proudfoot. He did not call any person connected with the Bowers Hotel, where he claims to have obtained part of the money paid to Proudfoot, and he did not even fortify his own testimony by calling Brown as a witness, from whom he declared he received the remainder paid to Proudfoot, although it appears in the record that Brown was in the courtroom. Moreover, it is conclusively established that Proudfoot paid a commission of \$1,500 on account of the exchange, by giving his note for \$750 to Grussi & Bolds and a like note to Shefler; and the notes were

given because Proudfoot did not have any ready money. Eldriedge represented to Jones that Shefler was a capitalist, and that Proudfoot would be obliged to follow any directions given by Shefler, because Proudfoot was heavily indebted to Shefler; and Jones was also told that the Fairfield farm would be conveyed to Proudfoot as the purchase price of his equity remaining in the hotel, but that the Durbin farm must be conveyed to Shefler to pay the demands be held against Proudfoot and the hotel. The contract was made with Shefler, and not with Proudfoot, because of the explanation that the latter would be obliged to do as Shefler directed. Jones claims that both Shefler and Eldriedge advised him to stay away from Proudfoot, for the reason that the deal might be interfered with. That Jones did not see Proudfoot is corroborated by the circumstance that no witness, except Eldriedge, even intimates that Jones was ever seen with Proudfoot until all the parties met at the bank in Salem when the deeds were exchanged. The truth is that Shefler was not a capitalist, and Proudfoot did not owe him a single cent. The oral negotiations contemplated that all the land should be freed from encumbrances; but, before reducing the contract to writing, Eldriedge informed Jones that the parties who held the \$35,000 mortgage would not accept the money because the note had two years yet to run, and for that reason it was agreed that Shefler would give a mortgage on the Durbin farm to indemnify Jones for the mortgage on the Peer Hotel.

Soon after the deeds were exchanged, Eldriedge took possession of a part of the Durbin farm, and explained to Jones, as well as to others, that Shefler had agreed to sell him 200 acres at \$100 per acre. El-

driedge admitted, as a witness, that, when a man working on a portion of the land wanted to buy, he told the man to go to Shefler. Shefler had been employed by Eldriedge to assist the latter in conducting the negotiations, and Eldriedge had agreed to pay Shefler \$1,000 for his services; but apparently Shefler exacted more after the title had been transferred to him, because he refused to convey to Eldriedge. Shefler admitted to Grussi that he declined to make a deed because he was going to get the commission, and more too. He stated to both Grussi and Boldts that he was holding the land in trust for Eldriedge; and although he alleges in his answer that he owns the farm, no claim of that character appears from his testimony. After Shefler refused to make a conveyance to Eldriedge, the latter, at the suggestion of A. M. Cannon, a son-in-law of Jones, caused a creation of the Swastika Farms Company, a corporation, and for the purpose of clouding the title, so as to prevent Shefler from selling to an innocent purchaser, Eldriedge conveyed all his interest to the corporation. On July 25, 1912, the Swastika Farms Company, as the successor of Eldriedge, commenced a suit against Shefler in Multnomah County. The complaint which was sworn to by Eldriedge, alleges that on January 31, 1912, Shefler by a parol agreement leased the Durbin farm for a period of two years to Eldriedge, and as a part of the agreement Eldriedge was given an option to purchase the property for \$37,000, which could be paid in cash, or by assuming the \$35,000 mortgage held by Jones and paying \$2,000 in cash, and that, relying upon the verbal agreement, Eldriedge went upon a part of the farm and made permanent improvements. When testifying as a witness, Eldriedge stated that he caused the Durbin farm to be transferred to Shefler, because

the latter had agreed to loan him \$10,000 with which to improve the property. Soon after Shefler's refusal to convey to Eldriedge, the latter stated that it would be necessary to prove that he had possessed an equity in the Fairfield farm in order to secure the title from Shefler. The Fairfield and Durbin farms, aggregating 1,250 acres, were figured at \$100 per acre, making an aggregate of \$125,000, which was equal to the price placed upon the Peer Hotel. Assuming that Jones held one half of the Fairfield farm as security only, then he had \$25,000 worth of property to secure an indebtedness of \$17,500, leaving an equity of \$7,500 remaining in Eldriedge. Figuring the Durbin farm at \$100 per acre, the total value was \$75,000, and after deducting the \$35,000 mortgage, according to the contention of Eldriedge, he then received an interest valued at \$40,000 for an equity worth only \$7,500. It is not reasonable to believe that Jones would have entered into such an agreement. The evidence convinces us that Jones was induced by fraud to convey the Durbin farm to Shefler, and our belief in the correctness of this conclusion is strengthened when we look at the kaleidoscope of contradictions presented by the variant oral and written declarations made by Eldriedge and the shifting positions taken by him.

4. It remains to determine whether Jones affirmed the conduct of Eldriedge and Shefler by securing the \$5,000 loan and making the \$1,000 loan. Jones met Shefler in Salem about April 27, 1912, pursuant to the latter's request, and at that time Shefler stated that he desired to borrow \$5,000 for the purpose of making improvements on the farm. Jones said that he did not have any money to loan. Some negotiations were had with Ladd & Bush, bankers, but the bank declined to

make a loan on a second mortgage; the security offered being a mortgage on the Durbin farm, subject to the prior \$35,000 mortgage. It was finally agreed, however, that the bank would make the loan if Shefler would give his note and mortgage to Jones and the latter would add the security of his own financial worth by indorsing the note to the bank. The note and mortgage were given as agreed, and Jones immediately indorsed the note to Ladd & Bush, who then loaned the money. Eldriedge testified that he made arrangements with Jones for the money; but the latter swore that he knew only Shefler in the transaction, and did not know that Eldriedge had any interest in the loan until sometime afterward. Jones is to some extent corroborated by Shefler, who stated that nothing was said by the former to indicate that Jones had talked with Eldriedge. Jones did not make this loan direct to Shefler, but he served only as an instrumentality to enable Shefler to secure the money from the bank. Prior to that time Eldriedge represented to Jones that he had a contract to purchase 200 acres from Shefler at \$100 per acre. Jones at that time did not know that the land had been procured for the benefit of Eldriedge, nothing had occurred to charge Jones with notice of the facts, and consequently the \$5,000 loan does not furnish any foundation for a ratification or an estoppel.

In July, 1912, Eldriedge gave his note for \$1,000 to Jones, securing it with a chattel mortgage on some personal property used for operating the farm; and Eldriedge also delivered to A. M. Cannon 2,500 shares of the capital stock of the Swastika Farms Company to be held by him in trust and for the purpose of further securing the \$1,000 note. The advisability of taking the stock was discussed by Jones and his ad-

viser, Cannon. Eldriedge wanted to throw in the stock, and it was finally taken, although Cannon told Jones that it was not worth anything. The rule that the oral admissions of a party ought to be viewed with caution (Section 868, subd. 4, L. O. L.) is aptly illustrated by the record in this case. Thoroughly credible witnesses employ different language in detailing statements made by Jones in several conversations: and the extent of admissions ascribed to Jones differs according to the language used by the respective witnesses.

The attorneys who prepared the complaint for Eldriedge in the case of *Swastika Farms Co. v. Shefler* talked freely and without reservation to Jones; but, taking the complaint prepared by them in that case as an index of their understanding of the facts, they had been told that Shefler had only leased the property to Eldriedge with the option to purchase, which is a situation quite different from the position taken by Eldriedge at the trial. If the \$1,000 loan, the statements made by Jones, and the information given him by the attorneys for Eldriedge stood alone and without further explanation, there might be more weight in the contention that Jones did not act with diligence and promptly disaffirm the conveyance of the Durbin farm. Cannon testified that, when Eldriedge told him that it would be necessary to prove that the latter had an equity in the Fairfield farm, his suspicions were aroused, and he informed Jones that it would be necessary to proceed with caution in order to ascertain whether the transaction was as represented when the exchange was made. It will be remembered, too, that Eldriedge had told Jones that the former had a contract from Shefler for 200 acres at \$100 per acre, and when Eldriedge first complained to Cannon, or Jones, his grievance was because Shefler had refused to keep

his contract. Jones stated that, as between Shefler and Eldriedge, he would like to see the latter receive whatever belonged to him. And at no time after the refusal of Shefler to make a deed did Jones do or say anything that would even tend to operate as an affirmation of the deed to Shefler, when considered as a purchaser of all the land. On behalf of Jones there is evidence that it was understood that he and Eldriedge would together endeavor to wrest the title from Shefler, and, if successful, Eldriedge could depend upon Jones to do the fair thing and settle for the improvements made by Eldriedge. This contention finds support in the fact that Jones told a tenant to pay rent to the Swastika Farms Company, and that Jones would continue to act as manager of the farm; and it is further strengthened by the uncontradicted fact that Jones and Eldriedge continued to maintain their friendly relations even after the commencement of the suit, because it was Jones who loaned to Eldriedge \$1,300 in August, 1912, as well as \$100 on one occasion, and \$60 at another time. It is a significant fact, too, that the answer filed in this suit by Shefler charges Jones and Eldriedge with having entered into a conspiracy to divest Shefler of his alleged title to the farm. Subsequently Eldriedge was offended because neither Jones nor Cannon would loan him any more money; and the former appears to have acted in harmony with Shefler at the trial. Jones said that he did not really know all the facts until about one week before he commenced this suit. For the reasons enumerated, we conclude that Jones is still in a position where he can complain of the fraud perpetrated upon him.

5. Eldriedge was made to understand that Jones would do the fair thing and settle for the improvements made by Eldriedge; and, notwithstanding the

fact that Eldriedge was the principal in a fraud practiced upon Jones, it would nevertheless seem to be equitable to require Jones to keep the promise made to Eldriedge. The value of the improvements is estimated to be from \$4,000 to \$7,000. Fifty acres were planted to peach trees, 39 acres to loganberries and 45 acres to hops. The \$1,000 loan was for the purpose of paying for improvements. Shefler kept at least \$1,000 of the \$5,000 borrowed from Ladd & Bush, and Eldriedge used the remainder for improvements. Shefler should not be permitted to profit from the transaction. Except as to the \$1,000 retained by Shefler and not used for improvements, the \$5,000 note and mortgage should be taken care of by Jones. If Jones still has possession of the \$1,000 note, he will be required to surrender it to Eldriedge; and if the note has passed to the hands of a third person, Jones shall pay the note and cancel it. We believe a fair settlement for the improvements placed on the property will be accomplished by following the directions here given.

6. There is yet another feature of the case presented by the abstract and briefs filed by Eldriedge and the Swastika Farms Company. After the Circuit Court had rendered a decree, Eldriedge and his corporation filed a motion for an order to vacate the decree. The motion was accompanied by an affidavit showing that the United States National Bank of Salem, as holder of the Shefler \$35,000 note and mortgage, had commenced a foreclosure suit. Later on the defendants filed a second motion, which recited that the bank had reduced the \$35,000 note and mortgage to a judgment and decree. The court overruled both motions. The ruling of the court on the motions is not assigned as error; and, moreover, the defendants did not offer to file any proposed answer reciting the foreclosure suit

as a waiver or estoppel. In his complaint the plaintiff alleges that he brings the \$35,000 Shefler note into court subject to its orders. Jones cannot have both the land and the \$35,000 note signed by Shefler. If for any reason the note has been reduced to a judgment, Jones must cause it to be satisfied immediately upon the filing of the mandate in the Circuit Court. If the note has not been transformed into a judgment, Jones must at once cause the note to be canceled and surrendered. If Jones is not willing to comply with the conditions imposed, the conveyance to Shefler will not be disturbed, because as between Eldriedge and Shefler a court of equity will leave the controversy where it was first found. Jones is entitled to costs and disbursements in both courts.

The evidence in this case is voluminous. The controversy hinges upon questions of fact only. The rules applicable to the facts are fundamental, and are as old as equity jurisprudence. It is not necessary to consider or apply any new or debatable legal principles. The discussion of the evidence is of interest to no one except the parties to this litigation. Although the law requires a written opinion, and directs that it be printed, still no useful purpose is subserved by doing so. The writer attempts to express only his own views by pointing to this suit as a concrete illustration of the need for such a change in the law governing this court as will permit oral decisions, after giving notice to the parties, so as to enable them to be present, in all cases where the opinion will not be useful as a precedent.

The decree of the lower court is modified.

MODIFIED.

MR. CHIEF JUSTICE MOORE, MR. JUSTICE EAKIN and
MR. JUSTICE BEAN concur.

Argued July 13, affirmed July 30, rehearing denied September 14, 1915.

HARTMAN v. OREGON ELEC. RY. CO.

(149 Pac. 898; 151 Pac. 472.)

Master and Servant—Injury to Servant—Cause of Injury—Nonsuit.

1. Where, in an action for injuries to an electrician's helper from an electric shock while attempting without assistance to extend electric wires, there was evidence from which the jury might have found, either that the proximate cause of the injury was the defendant employer's negligence in failing to furnish deceased with needed assistance, or that the injury was due to a cause in respect to which defendant was not at fault, a nonsuit was properly denied.

ON PETITION FOR REHEARING.

Master and Servant—Injuries to Servant—Employers' Liability Act.

2. An employee engaged in putting up electric lines and installing lights comes within the protection of the employers' liability law (Laws 1911, c. 3); the work necessarily being dangerous.

Master and Servant—Injuries to Servant—Employers' Liability Act.

3. Under employers' liability law (Laws 1911, c. 3), Section 6, declaring that the contributory negligence of a person injured shall not be a defense, but may be taken into account by the jury in fixing the damage, slight carelessness of an employee will not bar recovery for an injury caused by the employee's carelessness and the gross negligence of the employer; but in all cases where there has been any negligence on the part of the employer, the issue of contributory negligence must be submitted to the jury for comparison.

[As to proceeding under Workmen's Compensation Act as governed by rules applicable to actions generally, see note in Ann. Cas. 1915A, 741.]

From Multnomah: CALVIN U. GANTENBEIN, Judge.

Department 2. Statement by MR. CHIEF JUSTICE MOORE.

This is an action by Mabel B. Hartman, the mother of William B. Hartman, deceased, against the Oregon Electric Railway Company, to recover damages resulting from his death, which is alleged to have been caused by the defendant's negligence. The deceased, on March 19, 1913, the time when he was hurt, was 22 years old, and was employed as an electrician's helper

by the defendant, which was then engaged near Orville, Oregon, in cutting a tunnel into which were extended electric light wires to furnish illumination. From the tunnel outward were suspended other wires, to which six electric lights were attached to illumine the dump, where material taken from the subterranean passage was deposited. At the mouth of the tunnel was a board, to which were fastened two switches—one being operated by the thumb and fingers, called a "button switch," and the other worked by a smaller lever, and known as a "knife switch"—whereby the electric current was controlled in the tunnel and along the dump. Mr. Hartman, on March 19, 1913, undertook, without assistance, to extend the wires outside the tunnel, so as to install three more lights, and in doing so received a shock of electricity from the effects of which he died.

The negligence charged in the complaint as the proximate cause of the injury is in effect: (1) That the defendant failed to promulgate and enforce any rules for the performance of the work in which Hartman was engaged when he was hurt; (2) that structural line work should not have been permitted without assistance by an electrician's helper, who was an inexperienced workman; (3) that Hartman was directed to work alone; (4) that he should not have been allowed to undertake a performance of such work, except under the control of an experienced electrician, who could have warned him of the danger; (5) that the wires were not insulated at the place where the deceased received the shock; (6) that the wire furnished him with which to do the work was in short pieces, requiring splicing and wrapping; (7) that the wires were not placed on poles, but were hung near the ground, and were so arranged as not to permit a per-

son safely to pass between them; (8) that the defendant informed Hartman the wires carried only 370 volts, when more than 750 were transmitted; (9) that the supports for the wires bore no color to indicate a dangerous voltage; (10) that the wires were uninsulated at places where employees were liable to come in contact with them, and the switches so placed as not properly to guard the wires; (11) that the wires were in a dangerous condition when first installed; (12) that the switch Hartman was required to use was out of repair; (13) that because of his age and inexperience it was the duty of the defendant to exercise great care for his protection, which it failed to do; (14) that a sufficient number of coemployees were not appointed to assist Hartman; (15) that the defendant required him to work in a dangerous place, outside the scope of his employment, and failed to warn him of the extra hazard; and (16) that a safe place was not furnished him in which to work.

The answer denied the material averments of the complaint, and for further defenses alleged, in substance, that Hartman was an experienced workman, who understood and appreciated all the dangers to which he was exposed; that he was forbidden by the defendant's proper agent to do any work at or near the tunnel; that he recklessly disobeyed such command; that he negligently failed to protect the joints of wire with tape; that the work which he was doing was carried on in the daylight, and it was unnecessary for him to turn on the lights; that he was carefully instructed as to the manner of doing all such work, and hence the injuries which he received were attributable to his own carelessness. The reply put in issue the allegations of new matter in the answer, and, the

cause having been tried, the plaintiff secured a judgment for the sum of \$5,000, and the defendant appeals.

AFFIRMED. REHEARING DENIED.

For appellant there was a brief over the names of *Mr. Isham N. Smith, Mr. John F. Logan, Messrs. Carey & Kerr* and *Mr. Charles A. Hart*, with an oral argument by *Mr. Smith*.

For respondent there was a brief with oral arguments by *Mr. Lotus L. Langley* and *Mr. Manche I. Langley*.

Opinion by MR. CHIEF JUSTICE MOORE.

1. It is maintained by the defendant's counsel that the proximate cause of the injury was Hartman's own negligence, and this being so, errors were committed in denying a motion for a judgment of nonsuit, when the plaintiff had introduced her testimony and rested, and in refusing to instruct the jury to find for the defendant when the cause was submitted. When the motion for a nonsuit was denied, the court limited the plaintiff's right of recovery to the sole issue as to whether or not it was necessary for the defendant to furnish the deceased with additional help, thereby excluding from the consideration of the jury all other grounds of negligence charged in the complaint as the proximate cause of the injury.

The action of the court in denying the request for a directed verdict will be reviewed, since this inquiry includes both questions. The testimony, all of which is made a part of the bill of exceptions, tends to show that a switch on the main wires controlled the electric current in the tunnel and along the dump.

E. F. Walton, the defendant's chief electrician, testified that on the day preceding his injury Hartman was given a button switch, which he installed on a board at the mouth of the tunnel, but this switch would turn off the light on only one side of the dump lines, and in order to deaden all these wires it was necessary to pull down the lever of the knife switch fastened to the same board; that when putting in this switch, March 18, 1913, J. E. Harris, who was in charge of the work at the tunnel, informed Hartman that more lights were needed on the dump wire in addition to the six that had been previously installed; that Hartman imparted such information to the witness, who told him the work could not well be done at that time for lack of wire with which to make the extension; that the next morning the witness sent Hartman to East Independence to replace some electric lights that had been burned out, directing him to report to another station on the defendant's railway as soon as he had complied with the previous command; that, instead of obeying such order, Hartman returned to the tunnel and with some short pieces of wire undertook to extend the 50 or 75 foot line along the dump about 25 feet further, so as to install three more lamps.

J. E. Harris testified that in doing such work Hartman first turned down the lever of the knife switch, pieced out and suspended the extended dump wires, and hung the additional lamps, but when he raised the lever of the switch, the new lamps which he had put up would not give any light, while those originally installed afforded illumination; that Hartman thereupon returned to the mouth of the tunnel, again pulled down the lever of the knife switch, re-examined the extension wires he had put up, and raised the lever of the switch, but the lamps he had installed would

not burn; that he repeated this operation about six times, with no different results; that this witness, having observed these unsuccessful attempts made by Hartman to cause the three lamps to burn, returned to his work, but soon thereafter, hearing a scream, he hastily went outside and found the deceased lying beneath a joint he had made in the extended wires, from which union the tape had been partially removed, or had not been wound; that at the same time the witness discovered the six lamps on the old wires were burning; that the button switch on the dump line had signals which should have denoted the condition of the electricity, but that such tokens were false, and indicated the current was turned off when it was on, and on when it was off.

The testimony of E. F. Walton was undertaken to be contradicted by offering in evidence an original answer, wherein it was averred in effect that Hartman was directed to renew the burned-out lamps at East Independence and then proceed to the tunnel, extend the wires and install the lamps. The defendant's counsel, explaining this discrepancy, stated to the court that when such answer was prepared it was supposed the allegation adverted to was correct, but, subsequently learning that Hartman had been commanded not to do any work at the tunnel on the day he was injured, an amended pleading was filed. The statement in the original answer was supplemented by a contradiction of the testimony of Walton, who declared that when Hartman was hurt he had with him only a pocket-knife, a screw-driver and a pair of pliers, when the testimony of Harris is to the effect that after the accident a grip full of electrician's tools was found near the place of the injury. From this conflicting testimony the jury evidently concluded that Hartman was

directed by Walton to perform the services in which he was engaged when he was hurt.

The plaintiff's testimony tends to show that, though Hartman was employed by the defendant as an electrician's helper, he was not a journeyman, and had but little knowledge of electricity, or of the dangers incident to the business. The defendant's testimony is to the effect that the deceased was an experienced workman, who knew and appreciated the hazards which he was liable to encounter in his employment. The testimony is also contradictory as to whether or not it was essential that Hartman should have had a helper when he was hurt. The foregoing is believed to be a fair epitome of the testimony applicable to the question involved, and based thereon it is argued that the judgment rendered herein is erroneous, since the evidence offered fails to show that the defendant's negligence was the proximate cause of the injury.

It will be remembered that Walton, the defendant's agent, furnished Hartman, to be used at the dump, a button switch, the signals of which were false. Whether or not this switch shut off the current from the side wire to which the six electric lights were attached does not appear from the testimony. That this switch was defective tends to show that the defendant was careless in the selection of instrumentalities, which negligence may have been the proximate cause of Hartman's injury. It is possible, however, that in installing the button switch Hartman may have neglected to turn the signal disk so as properly to indicate the condition of the electrical current on the dump line, from which supposed circumstance his incompetence might reasonably have been inferred, thus affording a reason for the necessity of furnishing him with additional help, the defendant's failure to supply which

may also have been the proximate cause of the injury. When there are two or more probable causes of an injury, the question should be submitted to the jury: *Elliff v. Oregon R. & N. Co.*, 53 Or. 66, 76 (99 Pac. 76); *Palmer v. Portland Ry., L. & P. Co.*, 56 Or. 262, 268 (108 Pac. 211); *Doyle v. Southern Pac. Co.*, 56 Or. 495, 516 (108 Pac. 201); *Smith v. Southern Pac. Co.*, 58 Or. 22, 31 (113 Pac. 41, Ann. Cas. 1913A, 434); *Graves v. Portland etc. P. Co.*, 66 Or. 232, 242 (Ann. Cas. 1915B, 500, 134 Pac. 1); *Gynther v. Brown & McCabe*, 67 Or. 310, 318 (134 Pac. 1186).

It is believed that there was evidence tending to show that the deceased was incompetent, and that therefore he should have had help, which afforded evidence of a problematical primary cause sufficient to be submitted to the jury, and that in denying the motion for a judgment of nonsuit, and in refusing to direct a verdict for the defendant, no errors were committed. Other errors are assigned, but they are deemed to be immaterial.

It follows that the judgment should be affirmed, and it is so ordered. **AFFIRMED. REHEARING DENIED.**

MR. JUSTICE BEAN, MR. JUSTICE EAKIN and MR. JUSTICE HARRIS concur.

Rehearing denied September 14, 1915.

ON PETITION FOR REHEARING,

(151 Pac. 472.)

Mr. Isham N. Smith, Mr. John F. Logan, Messrs. Carey & Kerr and Mr. Charles A. Hart, for the motion.

Mr. Lotus L. Langley and Manche I. Langley, contra.

Opinion by MR. CHIEF JUSTICE MOORE.

2. It is asserted in a petition for a rehearing that in the former opinion herein many of the important questions presented by the appellant's brief were not considered. The chief errors originally relied upon for reversal of the judgment were the denial of a motion for a judgment of nonsuit and the refusal to direct a verdict for the defendant, requests for which rulings by the trial court were based on the ground that Hartman's injury resulted from his own negligence, thereby precluding a recovery of any damages. At the time he was hurt, as appears from the averments of the complaint and from the evidence, he was in the defendant's service and engaged in putting up electrical lines and installing lights, which work was necessarily dangerous, requiring the defendant to exercise the highest degree of care to protect the lives and limbs of its employees, thus bringing the cause of action within the provisions of the employers' liability law: Gen. Laws Or. 1911, c. 3; *McClagherty v. Rogue River Electric Co.*, 73 Or. 135 (140 Pac. 64).

3. Section 6 of that act reads:

"The contributory negligence of the person injured shall not be a defense but may be taken into account by the jury in fixing the amount of the damage."

The method thus prescribed for determining the measure of compensation is not the rule of comparative negligence in Illinois, where slight carelessness on the part of an employee, when compared with gross negligence by the employer, will not prevent a recovery of damages for an injury sustained under such circumstances: 1 Thomp., Neg., § 269. The statute providing that the contributory negligence of an employee should not constitute a bar to his recovery of damages, but should be considered by the jury in determining the amount of his indemnity for an injury, is a recognition of the method prevailing in courts of admiralty of apportioning the damages between the parties in cases of marine torts, where the accident was partly due to the fault of the libellant: *Id.*, § 268.

In actions based on a violation of the provisions of the enactment mentioned, though the question of contributory negligence of an employee has been considered on appeal, the rule is that, when there has been any carelessness on the part of the employer, with which the negligence of the employee co-operates, the issue of contributory negligence must be submitted to the jury for comparison: *Filkins v. Portland Lumber Co.*, 71 Or. 249 (142 Pac. 578); *Chadwick v. Oregon-Washington R. & N. Co.*, 74 Or. 19 (144 Pac. 1165); *Sonnixsen v. Hood River Gas & Electric Co.*, 76 Or. 25 (146 Pac. 980). When, however, it satisfactorily appears, from an examination of all the testimony and a consideration of the inferences based thereon and of the presumptions deducible therefrom, that an employer has not been guilty of any negligence whatever, and the injury which the employee sustained resulted wholly from his own carelessness, there is then no question of contributory negligence to be submitted to the jury.

In the case at bar the testimony shows that the de-

fendant furnished to Hartman, an alleged incompetent employee, a defective button switch, which he installed where it controlled in part the current of electricity, by coming in contact with which he was injured. There was therefore negligence on the part of the defendant, to which the carelessness of Hartman conduced, and the issue of contributory negligence was properly submitted to the jury.

The petition for a rehearing should be denied; and it is so ordered. **AFFIRMED. REHEARING DENIED.**

MR. JUSTICE BEAN, MR. JUSTICE EAKIN and MR. JUSTICE HARRIS concur.

On the merits argued February 17, affirmed March 2, 1915.
Petition for rehearing submitted March 12, denied April 20, 1915.
Petition for modification filed May 1, denied May 18, 1915.
Rehearing denied September 14, 1915.

PULLEN v. EUGENE.*

(146 Pac. 822; 147 Pac. 768; 147 Pac. 1191; 151 Pac. 474.)

New Trial—Scope of Remedy.

1. On motion for new trial, the court can only re-examine the facts, and should not consider errors of law.

New Trial—Grounds—Statute.

2. Section 174, L. O. L., prescribing grounds for granting new trial, does not restrict the court to the grounds specified.

New Trial—Granting of.

3. Where the court discovers that it erroneously sustained a demurrer to the answer, it may at any time while it has jurisdiction of the cause grant a new trial on its own motion.

*As to the liability of highway officers for negligence, see notes in 22 L. R. A. 824 and 52 L. R. A. (N. S.) 142.

For cases passing upon the right of the court to grant new trial on its own motion, or on grounds other than those urged by the moving party, see note in 40 L. R. A. (N. S.) 291.

Appeal and Error—Exceptions—Necessity.

4. An order sustaining a demurrer to the answer being made upon the matter in writing and on file in the court, no exception is necessary under Section 172, L. O. L., to obtain review on appeal.

Constitutional Law—Remedy—Statute.

5. The charter provision that a city should not be liable to any person for injuries caused by defects in sidewalks or streets, unless the mayor, the chairman of street committee, or the street commission shall have had actual notice and reasonable opportunity to repair the defect, and that in no case shall more than \$100 be recovered as damages from the city, is not in violation of Article I, Section 10, of the Constitution, declaring that every person shall have remedy by due process of law for injuries done his person, property or reputation; for, as the city council is given power to repair the streets and sidewalks, one injured by reason of defects may maintain an action against the city officers for their breach of official duty.

Municipal Corporations—Officers—Liability of.

6. Though the mayor and councilmen of a city received no compensation for such services, they were liable for injuries received by reason of a defective way, where, with notice of the defects, they did not repair them, although authorized by the charter to do so.

[As to liability of ministerial officer to private person for misperformance and nonperformance of official duties, see note in 95 Am. St. Rep. 72.]

Municipal Corporations—Injuries on Streets—Statutes Limiting Recovery—Repeal—Effect.

7. A judgment of \$2,000 against a municipality for personal injuries was set aside because the charter limited a recovery in such cases to \$100. Subsequently such charter provision was repealed, and plaintiff moved for an order directing a judgment upon the verdict. *Held* that, since the repealing enactment did not provide for the maintenance of existing causes of action, plaintiff could not recover more than the amount originally limited.

From Lane: LAWRENCE T. HARRIS, Judge.

Department 1. Statement by MR. CHIEF JUSTICE MOORE.

This is an action by Josie Pullen against the City of Eugene, a municipal corporation, to recover damages for a personal injury. The plaintiff, Josie Pullen, was returning at night from the business section of the City of Eugene to her home in company with her husband, who stepped on the outer end of a broken plank in the sidewalk, thereby elevating one end of

the middle fracture, over which she stumbled and fell, sustaining an injury. The complainant charges that the defendant negligently constructed on Willamette Street a sidewalk, and carelessly permitted it to become dilapidated; that the defendant and its agents had knowledge of such conditions, or, by the exercise of reasonable diligence, should have known them; and that, in consequence of such defects, the plaintiff fell and was injured, particularly setting forth the manner of building the sidewalk, the defects therein, and the negligence complained of.

The answer admits that the defendant is a municipal corporation, and that the street where the injury occurred is used for public travel, but denies all the other averments of the complaint. For a further answer it is alleged in effect:

(1) That the defendant was incorporated by an act of the legislative assembly, filed in the office of the Secretary of State February 18, 1905; (2) that Section 116 of such act reads (setting forth a copy thereof as hereinafter quoted): "That neither defendant nor the council, chairman of the street committee, or street commissioner of said city at any time prior to the alleged accident and injury mentioned in said complaint had any notice, actual or otherwise, of the said alleged dangers or defective condition, defect, or dangerous place of the sidewalk referred to in the complaint, if such condition existed."

For a second defense, paragraph 1 of the first separate answer is repeated, and it is further alleged:

"That at and prior to the time of the occurrence of the alleged injury which plaintiff claims to have received, defendant had provided the necessary officers of defendant city to take charge of the improvement and repair of sidewalks in said city, and had performed all other acts required by the charter of said city to accomplish said purposes; that at the time of

said alleged injury defendant and its mayor, council, street commissioner, chairman of the street committee, and officers and employees had no notice, actual or otherwise, of any defect, dangerous condition, or dangerous place in the sidewalk mentioned in plaintiff's complaint; that defendant exercised reasonable care and prudence in doing all the things, and taking all the steps appropriate, or requisite by said charter, to maintain said sidewalk in a safe condition."

A demurrer to the first separate defense was sustained. The remaining averments of new matter in the answer were denied in the reply, and the cause, having been tried, resulted in a verdict and judgment in plaintiff's favor for the sum of \$2,000. Thereupon the defendant's counsel, based upon affidavits, moved to set aside the judgment and for a new trial on the grounds of newly discovered evidence; that the damages awarded were excessive; insufficiency of the evidence to justify the verdict; and error in law occurring at the trial and excepted to by the defendant.

The motion was allowed for the reason, as stated by the court, that the defendant was entitled to avail itself of the defense afforded by Section 116 of the city charter, and that an error had been committed in denying the assertion of such right. From the order granting a new trial the plaintiff appeals.

AFFIRMED.

For appellant there was a brief with oral arguments by *Mr. L. M. Travis* and *Mr. A. K. Meck*.

For respondent there was a brief over the names of *Mr. O. H. Foster* and *Messrs. Skipworth & Lewis*, with an oral argument by *Mr. Jay L. Lewis*.

Opinion by MR. CHIEF JUSTICE MOORE.

1-4. It is contended that upon a motion for a new trial, which is an application for a re-examination of an issue of fact, the court was not authorized to set aside the judgment in consequence of having sustained a demurrer to the answer, which ruling is a determination of an issue of law, and hence an error was committed in this respect. A text writer, in discussing the subject of a new trial observes:

“The question as to the sufficiency or insufficiency of the evidence to justify the findings raises a plain issue of fact, and is properly determined on a new trial motion. It is otherwise, however, as to the insufficiency of the evidence to justify the judgment. Upon the same principle—viz., that a new trial is a re-examination of an issue of fact—it has been held that errors in rulings upon demurrers to pleadings cannot be reviewed on motion for new trial. It is manifest that this is a correct application of the principle; for, if final judgment is given upon the demurrer for either plaintiff or defendant, there would be no issue of fact, in the case”: Hayne, New Trial and Appeal (Rev. ed.), § 1.

It will be remembered that the demurrer herein challenged the sufficiency of only one ground of defense, thereby leaving for trial an issue of fact with respect to the second defense.

In 14 Ency. Pl. & Pr. 718, in speaking of the statutory grounds for a new trial, it is said:

“In the various Codes and practice acts attempts have been made to enumerate and briefly state the grounds for new trial. Such enumeration does not restrict the inherent power of courts to relieve a party where justice has not been done, or to grant new trials for any other sufficient causes not enumerated, unless the restriction is express.”

Our statute prescribes seven grounds for setting aside a judgment and granting a new trial: Section 174, L. O. L. This enactment does not restrict an exercise of such right to the particular instances specified: *De Vall v. De Vall*, 60 Or. 493 (118 Pac. 843, 120 Pac. 13, Ann. Cas. 1914A, 409, 40 L. R. A. (N. S.) 291). If at any time while jurisdiction of cause is retained it is discovered that such an error has been committed as would necessitate a reversal of the final determination reached in the trial of the cause, the court, committing such mistake of law, may, on motion of the party aggrieved, thereby or at its own instance voluntarily set aside the judgment and grant a new trial, thereby avoiding the necessity of an appeal: *De Vall v. De Vall*, 60 Or. 493 (118 Pac. 843, 120 Pac. 13, Ann. Cas. 1914A, 409, 40 L. R. A. (N. S.) 291); *Taylor v. Taylor*, 61 Or. 257 (121 Pac. 431, 964); *Sullivan v. Wakefield*, 65 Or. 528 (133 Pac. 641); *L. C. Smith & Bros. Typewriter Co. v. McGeorge*, 72 Or. 523 (143 Pac. 905); *Frederick & Nelson v. Bard*, 74 Or. 457 (145 Pac. 669). If, however, an error was committed in sustaining the demurrer to the first cause of defense, the court on its own initiative was authorized to set aside the judgment and grant a new trial. Nor was it necessary, when the demurrer was sustained, to save an exception to the court's ruling, since it was made upon a matter in writing and on file in the court: Section 172, L. O. L.

5. The remaining question is whether or not Section 116 of the municipal charter violates a clause of the organic law of the state which provides that:

"Every man shall have remedy by due course of law for injury done him in his person, property or reputation": Article I, Section 10, of the Constitution of Oregon.

The part of the charter referred to reads:

“The City of Eugene shall not in any event be liable in damages to any person for an injury caused by any defect or dangerous place at or in any sidewalk, crosswalk, street, alley, bridge, public grounds, public buildings, or ditch, unless the mayor, chairman of the street committee, or street commissioner shall have had actual notice of such defect or dangerous place, and a reasonable time thereafter in which to repair or remove such defect or dangerous place before the happening of such accident or injury, and in no case shall more than \$100 be recovered as damages, from the city for any such accident or injury.”

Upon considering the demurrer the trial court was of the opinion that the language last quoted trenched upon the clause of the fundamental law referred to. When, however, the motion for a new trial was interposed, the court, having carefully examined the charter and discovered that its provisions did not exempt any officer of the city from liability for damages from an injury resulting from negligence in failing to keep a sidewalk in repair, set aside the judgment. In *Mattson v. Astoria*, 39 Or. 577 (65 Pac. 1066, 87 Am. St. Rep. 687), the charter provided that:

“Neither the city nor any member of the council thereof shall in any manner be held liable for any damages resulting from a defective condition of any street, alley, or highway thereof.”

And it was held that such clause was repugnant to Section 10 of Article I of the original act of the state. In *Batdorff v. Oregon City*, 53 Or. 402 (100 Pac. 937, 18 Ann. Cas. 287), a clause of the charter exempted Oregon City from liability for loss occasioned by accident on account of the condition of any street, but not exonerating any officer for a casualty caused by the willful neglect or gross negligence of such officer,

and it was determined that the charter practically denied a remedy to any person injured in consequence of the carelessness of agents of the city.

By Section 48 of the charter of the City of Eugene authority is conferred upon the common council to levy, assess and collect taxes upon all nonexempt property (subdivision 1); to appropriate for any item of city expenditure, and provide for the payment of the expenses of the city (subdivision 40); to prevent and remove all obstructions from the streets, alleys, crosswalks, sidewalks, public parks, and other public places, and to repair and clear the same at the expense of the property fronting on such improvement, or of the city (subdivision 51). The common council is also empowered to improve or repair any street or alley, or any part thereof: Section 50.

In *Batdorff v. Oregon City*, 53 Or. 402 (100 Pac. 937, 18 Ann. Cas. 287), it is said:

“Though there is a conflict of judicial utterance as to the common-law liability of a city for a failure to keep a street in repair, the weight of authority supports the principle that, when a charter invests a municipal corporation with exclusive control over the streets within its limits, and authorizes it to employ the means necessary to improve and maintain such highways, a duty to the public arises by implication of law to keep the streets that have been opened for travel in a reasonably safe condition; and for any injury that may result from a failure to discharge such obligation the city, without any statutory provision to that effect, must respond in damages.”

In addition to the authorities there cited, see, also, the notes to the cases of *Browning v. City of Springfield*, 17 Ill. 143 (63 Am. Dec. 345), *Goddard v. Inhabitants of Harpswell*, 84 Me. 499 (24 Atl. 958, 30 Am. St.

Rep. 373), and *Batdorff v. Oregon City*, 53 Or. 402 (100 Pac. 937, 18 Ann. Cas. 287).

To recover for a loss occasioned by official dereliction of duty, not involving more than \$100, an action may be maintained against the defendant herein. If, however, the amount of injury caused by the negligence of the defendant or its agents exceeds that sum, an action may be maintained against the officers of the municipality whose duty it was to cause the street to be repaired, and to see that the highway was kept in suitable condition for public travel. Since such a remedy is availing, the section of the charter referred to does not violate the clause of the fundamental law of the state.

No error was committed in setting aside the judgment and granting a new trial, and the order to that effect is affirmed.

AFFIRMED.

MR. JUSTICE BENSON, MR. JUSTICE BURNETT and MR. JUSTICE McBRIDE concur.

Rehearing denied April 20, 1915.

ON PETITION FOR REHEARING.

(147 Pac. 768.)

The Circuit Court having been affirmed in setting aside the judgment rendered therein and granting a new trial, the appellant files in this court a petition for rehearing. Upon the hearing of said application the rehearing was denied and the former opinion sustained.

REHEARING DENIED.

Mr. L. M. Travis and Mr. A. K. Meck, for the appellant.

Messrs. Skipworth & Lewis, for the respondent.

Department 1. Opinion by MR. CHIEF JUSTICE MOORE.

6. In a petition for rehearing it is maintained that, though the charter of the City of Eugene confers upon the common council authority to repair a street and to defray the expense thereof either by taxing all the nonexempt property in the municipality or by imposing upon the premises specially benefited an assessment for the improvement made (Special Laws Or. 1905, p. 255, c. 7, § 48, subd. 51), the mayor and councilmen upon whom such obligation primarily devolves are not liable for any injury sustained by reason of their nonfeasance in failing to discharge that duty, nor are they responsible for the misfeasance of their subordinates, since the officers particularly designated receive no compensation for their services: *Id.*, § 34.

The case relied upon to support the principle asserted is *Nowell v. Wright*, 3 Allen (Mass.), 166 (80 Am. Dec. 62), which was an action to recover damages sustained by the plaintiff's wife by falling into a river at night, in consequence of the negligence of the defendant, a bridge-tender, who, while operating the draw of the span, failed to shut the gates thereat or to hang out lanterns as warnings of danger. The court, having found that the appointment of the keeper of the bridge was not honorary, nor that his services were gratuitous, determined that, as a public officer, he was responsible for his acts of misfeasance, on the ground that his labor was voluntary and attended with compensation, and his duty was entire, absolute,

perfect and personal, and not only were his services such as he was under obligation to perform, but he was also clothed with ability to discharge the duty both in respect to the means at his command and the legal authority to act, irrespective of superior officers. That case has been cited as a recognized authority by the Supreme Judicial Court of Massachusetts in several of its decisions, but we have not found an instance in which the want of compensation by an officer for the performance of the services required of him has been considered as a prerequisite to the liability imposed. The rule so adopted in that state has been adhered to, but the decisions of that court have been put on other grounds. Thus in *Moynihan v. Todd*, 188 Mass. 301, 305 (74 N. E. 367, 108 Am. St. Rep. 473), in referring to the preceding case relied upon herein, it is said:

“We are of opinion that the principle which underlies the rule that public officers and other agencies of government are not liable for negligence in the performance of public duties goes no further than to relieve them from liability for nonfeasance and for the misfeasance of their servants or agents. For a personal act of misfeasance, we are of opinion that a party should be held liable to one injured by it, as well when in the performance of a public duty as when otherwise engaged. We think that the general course of decisions in this commonwealth is not in conflict with this view. But, for acts of misfeasance of a servant or agent in such cases, there is no liability. This is because the rule *respondeat superior* does not apply.”

In *Bartlett v. Crozier*, 17 Johns. (N. Y.) 439, 450 (8 Am. Dec. 428), it was held that a civil action would not lie against an overseer of highways by an individual who had sustained an injury in consequence of the negligence of such officer in failing to keep a

bridge in repair. In deciding that case, Chancellor Kent observes:

“When the laws render a public officer liable to special damages for neglect of duty, the cases are those in which the services of the officer are not uncompensated or coerced, but voluntary and attended with compensation, and where the duty to be performed is entire, absolute, and perfect.”

The case last mentioned is referred to in *Adsit v. Brady*, 4 Hill (N. Y.), 630, 632 (40 Am. Dec. 305), where it is said:

“When an individual sustains an injury by the misfeasance or nonfeasance of a public officer, who acts or omits to act contrary to his duty, the law gives redress to the injured party by an action adapted to the nature of the case.”

In *Robinson v. Chamberlain*, 34 N. Y. 389, 396 (90 Am. Dec. 713), it was ruled that a contractor who, pursuant to law, had been employed by the state and received a compensation for performing a public duty, was liable to any person sustaining special damage in consequence of his failure to discharge such obligation.

The case of *Piercy v. Averill*, 37 Hun (N. Y.), 360, was an action against the mayor and aldermen of the City of Ogdensburg, New York, to recover damages for a personal injury resulting from the defendant's failure to cause snow and ice to be removed from a sidewalk, whereby the plaintiff slipped, fell, and was hurt. A demurrer to the complaint having been overruled, an interlocutory judgment was rendered, in reversing which it was said:

“The general rule in this state is that public officers, charged with a ministerial duty, are answerable in damages to anyone specially injured by their careless-

ness and negligent performance of, or an omission to perform the duties of, their office.”

Further in the opinion it is observed:

“The defendants again urge that they are not liable for a neglect of their duty, because by the city charter the city is declared not to be liable for any injury caused by a sidewalk being out of repair, or by slipping upon snow or ice thereon. They argue that, if the principal is not liable, they [the agents], are not. It is hardly accurate to say that the city and the common council stand merely in the relation of principal and agent. * * But, if we adopt the view that the common council are the agents of the city, still there is no reason why an agent should not suffer for damages occasioned by his wrongful act, even though his principal be not liable. If a statute should relieve a railroad company from any liability for the wrongful act of its servants, there would be no reason why the servants should not continue liable for their own wrongful acts. If the doctrine of *respondeat superior* were abolished, the doctrine that he who does an injury should pay the damages he has caused would be unaffected.”

It is also remarked:

“A further argument is that public policy should forbid us to hold the defendants liable, inasmuch as such a rule of liability would drive from the common council persons of responsibility. We cannot give much weight to this argument. The defendants say we ought to be allowed to accept office and knowingly to neglect our duties, without any liability to those whose limbs are broken through our negligence, because no responsible persons will accept office, except on the condition that they may neglect its duties with impunity. It is enough to say in reply to this that it is better to have irresponsible officers who attend to their duties than responsible officers who do not.”

In the decisions last mentioned no reference is made to the doctrine announced in the case of *Bartlett v. Crozier*, 17 Johns. (N. Y.) 439 (8 Am. Dec. 428), to the effect that, in order to render a public officer liable to special damages for neglect of duty, it must appear that his services were voluntary and for compensation. We conclude, therefore, that the principle announced by the Chancellor in the original case was in the later case regarded as no longer controlling.

If the payment of compensation to a public officer for a performance of the duties required of him is to determine the question of liability for his negligence, then the amount of his salary is immaterial, so that, if he annually received a nominal sum only, his responsibility would be the same as if he were well paid for his services. The mere statement of such inequitable consequences that would necessarily result from the case supposed conclusively illustrates the absurdity of the doctrine maintained. If the mayor and the councilmen have funds or the authority to procure them, and, neglecting their duty, make no effort to obtain such means, they are liable in failing to repair a street, if they had notice of the defect: *Bates v. Horner*, 65 Vt. 471 (27 Atl. 134, 22 L. R. A. 824).

In *Grant v. Baker*, 12 Or. 329 (7 Pac. 318), it was held that an action would lie against such officers to recover damages resulting from personal injury alleged to have been caused by their failure to keep a street in repair, though nothing was said in the opinion with respect to any compensation having been paid to the councilmen.

The mayor and councilmen of the City of Eugene are not parties hereto, and anything said or intimated in this opinion will not conclude them from controverting their liability for the damages sustained by the

plaintiff, if she institutes an action against them. Without deciding the question, however, it is believed that she has a *prima facie* right of action against them.

The former opinion is therefore adhered to and a rehearing denied.

REHEARING DENIED. FORMER OPINION SUSTAINED.

MR. JUSTICE BENSON, MR. JUSTICE BURNETT and MR. JUSTICE MCBRIDE concur.

Denied May 18, 1915.

SECOND PETITION FOR REHEARING.

(147 Pac. 1191.)

This is a second application and petition for a rehearing herein. The reason for denying this petition is set forth in the opinion of the court.

SECOND PETITION FOR REHEARING DENIED.

Mr. L. M. Travis and *Mr. A. K. Meck*, for appellant and for petition.

Messrs. Skipworth & Lewis and *Mr. O. H. Foster*, for respondent and against petition.

Department 1. Opinion by MR. CHIEF JUSTICE MOORE.

In a second petition for rehearing, judgment for \$100, the limit of a recovery against the municipality, is demanded, together with the costs and disbursements incurred at the trial and on the appeal. Had the request been made when the motion to set aside the judgment and grant a new trial was interposed,

a very different conclusion would probably have been reached by the trial court. Speculating, however, upon a reversal of the ultimate judgment, it was insisted upon appeal that errors had been committed in granting the original motion. When the judgment was affirmed, an offer was made to accept a judgment against the city for the sum for which a recovery might have been had.

This application comes too late, and for that reason is denied.

SECOND PETITION FOR REHEARING DENIED.

MR JUSTICE BENSON, MR. JUSTICE BURNETT and MR. JUSTICE MCBRIDE concur.

Denied September 14, 1915.

PETITION TO RECALL MANDATE.

(151 Pac. 474.)

The order and judgment of the lower court setting aside the verdict of the jury for \$2,000 in favor of plaintiff, and granting a new trial, was affirmed on appeal, and plaintiff now moves to recall the mandate heretofore issued and for an order directing judgment to be entered on the verdict in her favor.

PETITION DENIED.

Mr. L. M. Travis and *Mr. A. K. Meck*, for appellant and for the petition.

Messrs. Skipworth & Lewis and *Mr. O. H. Foster*, for respondent and against the petition.

Department 1. Opinion by MR. CHIEF JUSTICE MOORE.

7. This is a motion to recall a mandate and to secure an order directing a judgment to be entered on a verdict. The plaintiff was injured by falling on a sidewalk in the City of Eugene, and in an action against that municipality to recover the damages sustained she secured a verdict and judgment for \$2,000. This judgment was set aside by the trial court, because the defendant's charter limited a recovery in such cases to \$100. The action of the trial court was affirmed on appeal; this court holding that the clause of the charter was not violative of Article I, Section 10, of the Constitution of Oregon, which declares that every person shall have remedy by due process of law for injuries done his person, property or reputation, for, as the city council was given power to repair sidewalks, anyone hurt by reason of a defect therein might maintain an action against the city officials for a breach of their duty: *Pullen v. Eugene*, ante, p. 320 (146 Pac. 822, 147 Pac. 768, 1191). The mandate from this court having been sent down, an amended complaint was filed by leave of court, making as parties defendant the city officers whose breach of duty is asserted to have been the cause of the accident. Thereafter the clause of the charter was repealed, at an election held for that purpose, whereupon this motion was interposed; the plaintiff's counsel insisting that, the impediment against a recovery of more than \$100 having been removed, judgment should now be entered as originally given.

In *Newsom v. Greenwood*, 4 Or. 119, it was held that an enactment repealing or modifying the remedy of a party should not be so construed as to affect actions or suits brought before the repeal or modifica-

tion. The repeal of a law conferring jurisdiction, however, takes away the right to proceed as to all actions undetermined at the time of the repeal, unless there is a saving clause in the abrogating enactment: *State v. Ju Nun*, 53 Or. 1 (97 Pac. 96, 98 Pac. 513). "Legislation which prejudicially affects vested rights or the legal character of past transactions," says Mr. Justice BEAN, in *Judkins v. Taffe*, 21 Or. 89, 91 (27 Pac. 221, 222), "will not be construed as retroactive, unless it is declared so in the act, and the courts will give to such enactments a prospective rather than a retroactive construction, if possible." A certified copy of the enactment, repealing the limitation clause of the charter, having been sent up, an examination thereof shows that no provision was made therein for the maintenance of existing causes of action thereunder. The plaintiff's remedy, if more than \$100 is undertaken to be recovered, is against the city officers, as it existed prior to the repeal of the limiting clause of the charter.

The petition should be denied, and it is so ordered.

PETITION DENIED.

MR. JUSTICE BENSON, MR. JUSTICE BURNETT and MR. JUSTICE McBRIDE concur.

Argued September 7, affirmed September 14, 1915.

LOUGHRAN v. BARKER.

(151 Pac. 475.)

Attorney and Client—Action for Compensation—Employment—Sufficiency of Evidence.

1. In an attorney's action for a fee, evidence on the point of employment by the defendants held insufficient to make out a *prima facie* case.

[As to right of attorney to recover compensation, see note in 127 Am. St. Rep. 841.]

From Multnomah: HENRY E. MCGINN, Judge.

Department 2. Statement by MR. JUSTICE EAKIN.

This is an action by Patrick H. Loughran against S. B. Barker and another.

The plaintiff alleges in his complaint that he is an attorney practicing before the Interior Department, at Washington, and that the defendants employed him to perform certain services before said Department in the procurement of a patent, which he obtained, and promised to pay him \$200 therefor in case he was successful.

The answer denies the hiring of plaintiff and any promise to pay him any sum whatever, and alleges that whatever service plaintiff rendered was done at the instance of A. W. Lafferty; that they contracted with Lafferty to represent them in certain cases before the Interior Department on a contingent fee; that in 1910 Lafferty, having been elected to Congress, could not longer represent them, and they were obliged to and did employ other counsel for that purpose. Said answer further alleges that with the retirement of Lafferty from said cases all relations between the plaintiff and defendants ceased. The cause was tried before the court below without a jury, and on conclusion of plaintiff's evidence the case was dismissed by the court on its own motion, from which judgment plaintiff appeals.

AFFIRMED.

For appellant there was a brief over the name of *Messrs. Westbrook & Westbrook*, with an oral argument by *Mr. J. W. Westbrook*.

For respondents there was a brief over the name of *Messrs. Fulton & Bowerman*, with an oral argument by *Mr. Jay Bowerman*.

MR. JUSTICE EAKIN delivered the opinion of the court.

The only question presented on this appeal is: Did plaintiff make out a *prima facie* case? The evidence consists of the depositions of plaintiff and A. W. Lafferty, and of numerous copies of letters from Lafferty and other persons, some of whom were not shown to have been connected in any way with the defendants. It appears that Lafferty was employed by the defendants to represent them before the Interior Department in an endeavor to secure patents for certain homestead entries which were contested by the government, and that they agreed to pay him \$400 for each patent which he might secure. Lafferty in turn agreed to pay plaintiff one half of such sum when he received the same. The only other evidence of any employment is the following letter to the Interior Department:

“January 21, 1909.

“Subject: In re the Eight Homestead Entries, The Dalles, Oregon, Land District, Listed Below.

“The Honorable Secretary of the Interior, Washington, D. C.—

“Sir: We, the undersigned, F. M. Pliter and S. B. Barker, are transferees of the eight homestead entries listed below, and we authorize P. H. Loughran, of Washington, D. C., to appear and represent us as our attorney: H. E. No. 9301, made May 6, 1901, by Charles T. Goodman; H. E. No. 8449, made August 16, 1900, by Susan Robinson; H. E. No. 9932, made May 13, 1901, by Thomas J. Henderson; H. E. No. 9516, made July 3, 1901, by Huldah J. Ball; H. E. No. 8465, made September 6, 1900, by Flora L. Montgomery; H. E. No. 8518, made September 20, 1900, by Edwin B. Wheat; H. E. No. 8521, made September 21, 1900, by Russell Newman; H. E. No. 8200, made May 5, 1900, by Thomas J. Loudermilk.

“Very respectfully,

“S. B. BARKER,

“F. M. PLITER.”

It is claimed by the defendants that this letter was sent under the representation made to them that it was necessary for plaintiff to have this authority to enable him to appear before the Department in this case, and for no other purpose. From a careful reading of the evidence we are convinced that this contention is correct. The whole case shows that this letter was written upon the understanding that it was a necessary legal formula to enable plaintiff to appear before the Department in this cause, and that it was not intended by the defendants as an employment of the plaintiff, or to change in any manner the relation of the parties; and from the letters written by Mr. Lafferty and from his testimony it appears it was not so intended. The witness Lafferty conducted all the correspondence up to this time, and he says:

"Q. You do not believe, from the conversation and remarks of Mr. Barker at that time, that he understood that he was making an independent arrangement with Mr. Loughran to act as attorney, other than through you, do you?

"A. I never understood it that way.

"Q. It was made perfectly plain to Mr. Barker that Mr. Loughran was acting for you, was it not?

"A. I think that was clearly understood.

"Q. So far as you know, did Mr. Barker, prior to the time that your connection with the cases terminated, have any direct dealings with Mr. Loughran?

"None that I know of. He always came to my office to answer letters, when I would notify him that I had received any from Mr. Loughran.

"Q. The whole business, so far as you know, in connection with the Huldah J. Ball case, and so far as concerned Mr. Loughran, was conducted through your office, prior to the time you severed your connection with the case?

"A. Yes; that is true.

"Q. And you failed to persuade Mr. Barker to go ahead with Mr. Loughran in the matter?

"A. On the occasion of this last interview that I speak of, he seemed set that Mr. Loughran should get out of the case. I did not know then, and do not know now, what his motives were."

Mr. Lafferty appears to have been a perfectly fair witness; and, taking the whole case as presented by the testimony, we think plaintiff has failed to make even a *prima facie* case against the defendants, and that the court below was correct in ordering a nonsuit.

The judgment is affirmed.

AFFIRMED.

MR. CHIEF JUSTICE MOORE, MR. JUSTICE BEAN and
MR. JUSTICE HARRIS CONCUR.

Submitted on briefs October 10th on motions to dismiss appeals.
Motions denied November 10, 1914.

HOWARD v. HARTFORD INSURANCE CO.
HOWARD v. HORTICULTURAL FIRE RELIEF.
HOWARD v. GERMAN-AMERICAN INSURANCE CO.

(144 Pac. 450.)

Appeal and Error—Transfer of Cause—Notice of Appeal—"Signed by Himself or Attorney."

1. Under Section 550, L. O. L., providing that where notice of appeal is not given in open court, it must be in writing, "signed by himself or attorney," the appellant, with the approval of his attorney, or the attorney himself, may authorize another person to sign the attorney's name to a notice of appeal.

Appeal and Error—Notice of Appeal—Sufficiency of Service.

2. In view of Section 539, L. O. L., providing that notices may be personally served upon an attorney, or may be served during his absence by leaving notice at his office between 6 A. M. and 9 P. M. in a conspicuous place, returns of personal service of a notice of appeal on respondent's attorney, and of a service by leaving a copy thereof in a conspicuous place in his office between 6 and 9, when there was no person in the office, showed proper service.

Appeal and Error—Notice of Appeal—Order of Court.

3. An order entered of record, purporting to state certain facts as to the signing of a notice of appeal and the service thereof, and directed to be attached to the return of service of such notice, of which the appellant was not notified, and as to which neither party appeared, was void for want of jurisdiction to make it, and could not be considered for any purpose in passing on motions to dismiss for want of proper notice of appeal.

From Jackson: ROBERT G. MORROW, Judge.

Three actions by S. T. Howard and George A. Morse against the Hartford Fire Insurance Company of Hartford, Connecticut, the Horticultural Fire Relief of Oregon, and the German-American Fire Insurance Company of New York. Judgment in each case for plaintiffs and defendants appeal. Motions to dismiss appeals were submitted on briefs without argument under the proviso of Supreme Court Rule 18: 56 Or. 622 (117 Pac. xi). MOTIONS DENIED.

Messrs. Boggs & Wilson and Mr. William I. Vawter, for the motions.

Messrs. Veazie, McCourt & Veazie, contra.

In Banc. MR. JUSTICE RAMSEY delivered the opinion of the court.

The plaintiffs and respondents, in the three cases above named, have filed motions asking for orders of the court dismissing the appeals in said causes. The questions involved in said motions are the same in all of these cases. Each of said cases is an action for damages, and in each case the plaintiffs obtained a judgment in the court below. In each case the defendant appeals.

In the case against the German-American Fire Insurance Company of New York, the motion for dismissal of the appeal is in part as follows:

“Come now the above-named plaintiffs and respondents * * and move the court for an order dismissing the appeal in the above-entitled cause, for want of jurisdiction, upon the ground, that the defendant and appellant failed and neglected to serve or cause to be served on the plaintiffs and respondents the notice of appeal prescribed by statute at the time and in the manner required by the statute and the law. This motion is based upon the record herein.”

The respondents' briefs are the same in all three cases, and hence we understand that the points made are common to all the cases.

The motion does not point out specifically the objections to the appeal. They are specified in the respondents' brief. The motion is not based on affidavits, but is founded upon the record in the case.

1. The first point stated in the brief is that the notice of appeal that was served was inefficient for any purpose, the respondents claiming that it was not signed by the defendant or its attorneys. The copy of the notice of appeal contained in the transcript is in due form, and purports to have been signed by “Veazie, McCourt & Veazie, attorneys for the defendant.” We find nothing that is properly in the transcript that tends to bear out the contention of the plaintiffs; but the affidavit of I. C. Veazie shows the facts in relation to the signing of the notice. The firm of Veazie, McCourt & Veazie is located in Portland. The judgment appealed from was rendered in Jackson County, and the appeal was taken there. The defendant company had intrusted to said firm the full charge and direction of said cause for the defendant, and they were authorized by the defendant to employ associate counsel and to do any and all things necessary to be done in the furtherance of the interests and

rights of the defendant in relation to said cause. Said firm employed A. E. Reames, Esq., an attorney of this court, residing at Medford, in Jackson County, to prepare the papers for appealing this cause to this court, and authorized him to prepare the notice of appeal and to sign the name of said firm to said notice as attorneys for the defendant and appellant. Said affidavit shows, also, that A. E. Reames, Esq., was expressly authorized by the defendant to sign the name of said firm to said notice of appeal and to do all other things necessary to be done to perfect said appeal, and that all things that he did therein were approved by the defendant. Mr. Reames prepared said notice of appeal and subscribed the names of said firm thereto, as attorneys for said defendant and appellant. The said affidavit shows that the defendant and said firm expressly authorized Mr. Reames to sign the names of said firm to said notice, and, after he had done so, approved his said acts.

The plaintiffs contend that where notice of appeal is not given in open court, it must be in writing and signed by the appellant or his attorney (Section 550, L. O. L.). This contention is true, but the question is, Does the statute require the attorney for the appellant to sign the notice of appeal *with his own hand*?

The New York Code requires a summons to be "subscribed by the plaintiff, or his attorney." In *Barnard v. Heydrick*, 49 Barb. (N. Y.) 62, the fact was that the plaintiff's attorneys used a summons upon which their names had been *printed*, and it was contended that the summons was not "subscribed" by them. The printer had printed their names at the end of the summons. The court held in that case that the summons had been subscribed by the plaintiff's attorneys, within the meaning of the Code, although

their names were printed at the end thereof by a printer. A part of the syllabus of that case is as follows:

“A summons, issued by an attorney, with his name *printed* at the end thereof, is ‘subscribed’ by him, within the requirements of the Code.”

The statute of Wisconsin required that a summons “be subscribed by the plaintiff or his attorney.” In *Mezchen v. More*, 54 Wis. 216 (11 N. W. 534), the fact was that the name of the attorney at the end of the summons was *printed*, and the court held that it was “subscribed by the attorney” within the meaning of the statute, the court saying in part:

“The only object of requiring it [the summons] to show the name of the attorney or party who commences the action, and his postoffice address, is that the defendant may know upon whom and at what place he may serve his answer, and other papers in the action. * * This object is certainly as well accomplished when the name of the party or attorney is *printed* at the end of the summons as when it is written there; and unless the statute is imperative in requiring the signature in the handwriting of the attorney or party, there does not appear to be any reason for giving it that construction. We think the argument of the learned counsel for the appellant demonstrates that the statute does not require the written signature of the attorney or party.”

In *Hotchkiss v. Cutting*, 14 Minn. 540 (Gil. 408), the fact was that the summons was not signed by the plaintiff’s attorney, and that an agent of the plaintiff, in his presence and by his authority signed the plaintiff’s name thereto. The court in that case held that the summons was signed by the plaintiff, saying *inter alia*:

“This is a sufficient subscription by the plaintiff. It is certainly as good as the writing of a firm name of

attorneys made by one member of the firm, and it cannot be doubted that such a subscription of a summons would be valid."

In *Richardson v. Bachelder*, 19 Me. 82, it was held that where an attorney affixed the signature of a magistrate, which was on a slip of paper, to a writ, the writ was properly issued, the magistrate having recognized and adopted it.

In *Gamble v. Trahen*, 3 How. (Miss.) 32, the court says:

"It alleged that the clerk, * * whose name purported to be signed to the writ of *capias ad respondendum* had not, in fact, signed the same with his own proper hand. It was immaterial whether the clerk subscribed his name to the writ, or suffered another to do it for him. If it was issued by his consent and with his approbation, it was sufficient."

In *Louisville & N. R. Co. v. Banks* (Ky.), 33 S. W. 628, the court says:

"While the summons was prepared, and the name of the clerk subscribed thereto, by one who was not in fact a deputy, the clerk appeared before its delivery to the sheriff, and sent the process out, thus signed, as his own act, and it must be so regarded."

In *Woods v. Walsh*, 7 N. D. 386 (75 N. W. 767), the fact was that a third party signed the name of the attorney for the appellant to the notice of appeal at the request of said attorney, and the court held that the notice was properly signed: See, also, on this point *Hamilton v. State*, 103 Ind. 96 (2 N. E. 299, 53 Am. Rep. 491); *Herrick v. Morrill*, 37 Minn. 250 (33 N. W. 849, 5 Am. St. Rep. 841).

The affidavit of Mr. Veazie shows that both the defendant and the attorneys for the defendant authorized Mr. Reames to sign the names of the defendant's at-

torneys to the notice of appeal, and after he had done so, the defendant and its attorneys approved his said act. The record shows, also, that the defendant adopted the acts of Mr. Reames, by filing in this court the transcript for said appeal, including said notice of appeal, which was signed as stated *supra*. We hold that a person desiring to appeal a cause may, with the approval of his attorney, authorize another person to sign the name of his attorney to a notice of appeal, and that a notice, thus signed, is properly signed by the attorney for the appellant, and that attorneys for a person desiring to appeal a case may properly authorize another person to sign their names to such a notice. While there are some cases that announce a different rule, we deem the conclusion stated *supra* to be in accord with reason and the weight of authority.

2. The sheriff of Jackson County served said notice of appeal, and his return shows that said service was personally made upon W. I. Vawter, Esq., one of the attorneys for the plaintiff. This return shows due service. The sheriff, however, made another return of service of said notice in the following words:

“State of Oregon,
County of Jackson—ss.:

“I, W. H. Singler, sheriff of Jackson County, Oregon, hereby certify that I served the within notice of appeal, upon the plaintiff herein, within Jackson County, Oregon, on the 5th day of May, 1914, by leaving a full, true and correct copy thereof, duly certified to by me, as sheriff for Jackson County, Oregon, in a conspicuous place in the office and usual place of business of W. I. Vawter, an attorney of record for the plaintiff herein, and that I so left said copy of said notice in a conspicuous place in said office between the hours of 6 o'clock in the morning and 9 o'clock in the evening on the said 5th day of May, 1914. And I further certify that I made such service because there

was no person in the office of said W. I. Vawter, as such attorney, nor was there at said time any person in the office of Boggs & Wilson, attorneys for the plaintiffs, nor was I able to find either the said Boggs & Wilson or the said W. I. Vawter, in Jackson County, Oregon, at said time. That I endeavored to serve said notice of appeal by leaving said copy at the residence, of O. C. Boggs, attorney for plaintiffs and W. I. Vawter, attorney for the plaintiffs, but was unable to find any person at the residence of either, and, therefore, made such service by leaving said copy in a conspicuous place in the office of the said W. I. Vawter, attorney for the plaintiffs.

“W. H. SINGLER,
“Sheriff,
“By E. W. WILSON,
“Deputy.”

This return shows proper service upon W. I. Vawter, Esq., one of the attorneys of record for the plaintiffs: See Section 539, L. O. L.

3. It appears that the judge of the court below made and entered of record an order in which he purported to state certain facts in relation to the signing of said notice of appeal and the service thereof. The trial judge directed that said order be attached to the sheriff's return of service of said notice of appeal. The defendant was not notified of said proceeding, and did not appear therein. Neither party seems to have appeared therein. Said order is void for want of jurisdiction in the judge to make it, and it cannot be considered for any purpose in passing on said motions.

We find that the notice of appeal is in due form and properly signed, and that it was duly served, and that this court has jurisdiction of the appeals in the three cases referred to *supra*.

The motions to dismiss the said appeals are denied.

MOTIONS DENIED.

Argued June 30, modified July 13, rehearing denied September 14, 1915.

HOWARD v. HORTICULTURAL FIRE RELIEF.

(150 Pac. 270; 151 Pac. 476.)

Appeal and Error—Waiver of Objections to—Demurrer—Pleading Over.

1. While a demurrer to the form of the complaint may be waived by pleading over, if such demurrer attacks the sufficiency of a complaint to state a cause of action, and it is overruled, pleading over does not waive it for the purpose of an appeal, since the sufficiency of the complaint can be attacked in the Supreme Court for the first time.

Insurance—Fire Insurance—Title of Insured.

2. Where a policy of fire insurance was issued under Section 4666, L. O. L., as amended by Laws of 1911, page 279, regulating the conditions to be contained in such policies, no agreement or memorandum being attached thereto providing for the insurance of any interest less than the sole and unconditional ownership of the person named as assured, nor permitting the insurance of the building upon ground in which the insured had other than a fee-simple title, as required by the statute to effect such insurance, and of the two persons assured, who were operating the insured fruit cannery, one had purchased a half interest in the property as trustee with funds of his father's estate, of which he was an executor, under a will whereby the widow had equal title to the *corpus* of the estate with the executors, and could only be deprived of it by her own act, he could not recover upon the policy, as his interest in his share of the property was less than sole ownership.

[As to when concealments or misrepresentations avoid policy, see note in 35 Am. Rep. 629.]

Pleading—Construction—Complaint—Admissions.

3. Where the complaint in an action on a fire policy averred that plaintiff held only as trustee, he cannot contend that the complaint stated a cause of action, because of general averments of unqualified ownership, for the admission qualified the general allegation.

From Jackson: **ROBERT G. MORROW**, Judge.

Department 2. Statement by **MR. JUSTICE EAKIN**.

This is an action by **S. T. Howard, Jr.**, and **George A. Morse** against the Horticultural Fire Relief of Oregon. The facts are as follows:

On or about December 10, 1912, a fruit cannery located near Medford, Oregon, together with its equipment and contents, was destroyed by fire. At the time

of the said fire, and at the time of the issuance of the policies hereinafter mentioned, the record title to the property to the ground upon which the same was located stood in the name of S. T. Howard, Jr., and George A. Morse, plaintiffs in this action. Prior to the fire in question the plaintiff S. T. Howard, Jr., made application for and secured the issuance of fire insurance policies upon said property as follows:

On August 7, 1912, policy No. 17420 of the Horticultural Fire Relief of Oregon, purporting to insure S. T. Howard and George A. Morse against loss by fire for the term of one year beginning August 26, 1912, to an amount not exceeding \$750, upon a two-story frame building, together with its additions adjoining and communicating; on September 16, 1912, policy No. 18,198 of the Horticultural Fire Relief of Oregon, purporting to insure S. T. Howard and George A. Morse against loss by fire from September 14, 1912, to December 13, 1912, to an amount not exceeding \$500 upon fruit, green, dried or in process of drying, while contained in said fruit cannery building. Each of said policies contained and consisted of the provisions set forth in Section 4666, L. O. L., as amended by Laws of 1911, Chapter 175, and was what is commonly known as the "standard fire insurance policy." No agreement or memorandum was attached to or indorsed upon any of said policies providing for the insurance of any interest in said property less than the sole and unconditional ownership therein of the persons named as assured in said policies, nor permitting the insurance of a building upon ground in which the assured had other than a fee-simple title. On or about February 8, 1913, after said fire, the plaintiffs presented proofs of loss to the company issuing the policies above mentioned. In each

of said proofs of loss plaintiffs swore to the following statements concerning the ownership of the property claimed to have been destroyed by fire:

“That the interest of the assured and each of them is that of owner of an undivided one-half interest in and to the property described in said policy, and as to the undivided one-half interest of S. T. Howard, Jr., the estate of S. T. Howard, deceased, of which S. T. Howard, Jr., together with J. K. Howard, his brother, are executors, provided the money with which said property was purchased, and the said S. T. Howard, Jr., is, as such executor, trustee of said estate; that it is his custom to take title to property in his own name and insure it for the benefit of said estate in his own name, and that the said S. T. Howard has complete control of said property: * * there are no encumbrances on said property; heretofore there was an execution issued out of the Circuit Court of the State of Oregon in and for Jackson County, and levied upon said property; that said execution was void, to the best knowledge and belief of the insured, and each of them; that thereafter, and before this fire occurred, there was issued out of said Circuit Court of the State of Oregon for Jackson County, an injunction enjoining the sale of said property and enjoining the plaintiff [defendant] in said suit from proceeding further in said matter, which said injunction is still in force with a slight modification, and which modification was made *ex parte* and without notice to said S. T. Howard, in whose behalf said injunction was issued, and without whose knowledge said modification was obtained.”

This suit was commenced on June 25, 1913, to recover the sum of \$1,250 upon the two policies issued by the defendant as above set forth.

The defendant demurred to the complaint against it upon the ground that the complaint did not state facts sufficient to constitute a cause of action, in that it showed upon its face that plaintiffs were not the sole

and unconditional owners of the property described in the policy sued for. The demurrer was overruled, and defendant interposed an answer setting up the following provisions:

“This entire policy shall be void if the insured has concealed or misrepresented, in writing or otherwise, any material fact or circumstance concerning this insurance or the subject thereof, or if the interest of the insured in the property be not truly stated herein, or in case of any fraud or false swearing by the insured touching any matter relating to this insurance or the subject thereof, whether before or after a loss. This entire policy, unless otherwise provided by agreement indorsed hereon or added hereto, shall be void if the interest of the insured be other than unconditional and sole ownership, or if the subject of insurance be a building on ground not owned by the insured in fee simple.”

It was further alleged in said answer that plaintiffs herein were named as the insured in said policies of insurance; that at the time said policies were written and issued, and at the time of said fire, said plaintiffs were not the unconditional and sole owners of the property described in said policies, or of any part thereof, but an undivided one-half interest therein belonged to and was vested in the plaintiff George A. Morse, and the title to the remaining one-half interest therein was vested in plaintiff S. T. Howard, Jr., as trustee for the use and benefit of C. I. Howard and the estate of S. T. Howard, Sr.; that of the undivided one-half interest in said property the title to which was vested in the plaintiff S. T. Howard as aforesaid C. I. Howard was and is the beneficial owner of one half thereof, and the estate of S. T. Howard is owner of the other undivided one half thereof. The case was tried by a jury, and a verdict rendered in favor

of the defendant as to the first cause of action, namely, for \$500, and against it for \$750, from which verdict defendant appeals. MODIFIED. REHEARING DENIED.

For appellant there was a brief over the name of *Messrs. Veazie, McCourt & Veazie*, with an oral argument by *Mr. John McCourt*.

For respondents there was a brief over the names of *Messrs. Boggs & Wilson* and *Mr. William I. Vawter*, with an oral argument by *Mr. O. C. Boggs*.

MR. JUSTICE EAKIN delivered the opinion of the court.

1, 2. The important question involved on this appeal is in regard to the ruling of the court upon the demurrer, and subsequently upon admission of testimony on the ground that plaintiffs were not the unconditional owners of the title to the property. The proof of loss as incorporated in the complaint is twice set forth. Exhibit B as to the first cause of action shows that the half interest of the property sued for by plaintiff S. T. Howard was purchased by money from the estate of S. T. Howard, deceased. In the second cause of action it is again set forth as Exhibit D in the same language. Plaintiffs say that the complaint affirmatively alleges they are the owners of the property, each of an undivided half interest therein, contending that this allegation constitutes a *prima facie* case of ownership; but the allegation is a mere conclusion. The further facts as to the source from which the money came for the purchase of the undivided half interest of S. T. Howard, Jr., are set forth in the proof of loss, and are entirely adverse to the claim

that plaintiffs are the absolute owners thereof. From said proof, and this is not contradicted, it conclusively appears that S. T. Howard, Jr., is not the owner in fee simple of the property, but owns it in trust for the benefit of the estate of S. T. Howard, deceased, and he cannot become the owner of the property by reason of his custom of dealing with the property as his own. The title to the property is a legal question. Neither the assertions of S. T. Howard, Jr., nor of J. K. Howard have the effect to deprive the estate of S. T. Howard, deceased, or the widow, of title to the property. The ground of the demurrer to the complaint is that it does not state facts sufficient to constitute a cause of action. A demurrer to the form of the complaint may be waived by pleading over, and this is the character of pleading upon which plaintiff's counsel are relying: *Oregon & C. R. R. Co. v. Jackson County*, 38 Or. 589 (64 Pac. 307, 65 Pac. 369). The sufficiency of the complaint can be raised in this court for the first time; and, if demurred to, and the demurrer is overruled, pleading over does not waive it, as shown by numerous Oregon cases: *Creecy v. Joy*, 40 Or. 28 (66 Pac. 296); *Mellott v. Downing*, 39 Or. 226 (64 Pac. 393). Nor can the plaintiffs' case be established by presumptive title where the facts are disclosed as to the source of the money invested. Plaintiffs claim that by the terms of the will they were given full power to use the estate funds as they pleased. J. K. Howard's admission or statement as to whether the Howard estate claimed any interest in the property cannot bind the estate, cut off the interest thereof, or effect to give title. Counsel insist that the executors of the will, or either of them, can invest or dispose of the property of the estate without consulting the heirs

or the widow; but the will cannot be so understood. It provides that on the death of either of the testators the executors act for the deceased; and, in case there is one surviving, the other still retains his title, and can only be deprived of it by his own act. Upon the death of both the testators the executors are given full power in the management of the estate for the benefit of all the legal heirs and children. They may handle it or dispose of it only to the best interests of all concerned. The will throughout shows a trust in the executors and confidence that they will do what is right. It stipulates that they are to keep a correct account of the administration of the estate, and fairly carry out the spirit of the will for the benefit of the estate or the heirs in all things; and, one of the testators being still alive, nothing can be done without the acquiescence of the survivor. A fourth subdivision of the codicil, bearing date the 24th of August, 1907, provides:

“That any and all acts of our said executors, such as deeds, mortgages, leases, sales, investments, etc., must be made, done, and consented to by both of them and by the surviving testator or testatrix to be binding and valid; otherwise the same shall be void.”

The court instructed the jury:

“The real owner is the person whose money bought it. In this case * * no investment could be made without the concurrence and consent of the two executors and the widow. Notwithstanding that provision, if one of the executors should invest the money of the estate, the other executor and the widow would have a right to either affirm or disaffirm within a reasonable time after they discovered the investment, but they must exercise that right within a reasonable time. What is a reasonable time I will leave to you to determine.”

By the provisions of the will investments must be made, done, and consented to by both the executors and surviving testator to be binding and valid; otherwise the same shall be void. This does not place upon the testator any question of prompt election or affirmation of the act in order to render it void. In this case it appears fully from the testimony that the survivor had no knowledge of the transaction whatever, and therefore had no opportunity to elect, nor is there any testimony upon that question, and the will itself prevents the conclusion which the court adopts that she must be deemed to have approved it. The widow by the terms of the will must act for herself before she can be bound. The executor who acted in this case says that he bought the property on his own judgment, probably meaning thereby to insinuate that it became his individual purchase. He says that he did not consult either the executor or the widow, and his acts could not bind the widow or the estate. There was some question as to plaintiff's right to dispute this proof of loss, but the effect of that proof does not refute the fact that the purchase was made by said plaintiff as trustee. The defendant had a right to act upon that proof, and evidently did rely upon it in defending this suit, for nowhere until nearly the close of the case was it disclosed that such was not the case; in fact, it is not disclosed at all. J. K. Howard attempts to state that the estate had no claim upon this property, but he cannot determine that matter for the estate, or the heirs, and he admits that he knew nothing about it until shortly before this suit: *Finlon v. National Union Fire Ins. Co.*, 65 Or. 493 (132 Pac. 712); *Oatman v. Bankers' Fire Relief Assn.*, 66 Or. 388 (133 Pac. 1183, 134 Pac. 1033).

There was no question made upon the argument as to whether or not the interest of George A. Morse might be affected by the court's conclusion herein. However, we take it for granted that his interest in the insurance is not affected by this testimony.

The case will be reversed as to the interest of S. T. Howard, Jr., and affirmed as to that of George A. Morse; the judgment to be final in this court.

MODIFIED. REHEARING DENIED.

MR. JUSTICE MCBRIDE, MR. JUSTICE BEAN and MR. JUSTICE HARRIS CONCUR.

Denied September 14, 1915.

ON PETITION FOR REHEARING.

(151 Pac. 476.)

Rehearing denied and former opinion approved.

REHEARING DENIED.

Messrs. Veazie, McCourt & Veazie, for appellant.

Messrs. Boggs & Wilson and *Mr. William I. Vawter*, for respondent.

Department 2. MR. JUSTICE EAKIN delivered the opinion of the court.

3. This is a motion for a rehearing. Plaintiff urges the application of the same rule as stated in *Stanchfield Warehouse Co. v. Central R. R. Co.*, 67 Or. 396 (136 Pac. 34), to the effect that pleading over after demurrer is overruled waives the demurrer. The second point in the syllabi states:

“Plaintiff, by pleading over after a demurrer to the answer was overruled, did not waive the objection that

the answer did not state facts sufficient to constitute a defense, and such objection could be raised at any time during the trial, or on appeal."

This, we understand, states the general rule that the sufficiency of the complaint or the jurisdiction of the court are never waived, and can be raised at any time. In this case the plaintiff alleges that the interest of Howard in the insured property was in trust, and any allegation in the complaint of ownership of the insured property would fall before such a statement. Plaintiff relies upon the fact that the complaint alleges that he is the owner of the property sought to be recovered, and upon that allegation as conclusive in regard to that question; but such a conclusion cannot be reached, in the face of the allegations of the complaint that Howard owns only as trustee. That admission is relied upon by the defendant, and cannot aid the plaintiff to remand the case for further proceedings in the lower court, for the reason that there is no proceeding that will allow him to deny such admission.

The defendant objected to the question to Howard concerning the conclusion of law as to the owner of the property, where Howard answered, "Myself and Mr. Morse," when facts appearing in the complaint show that he does not own the property.

The motion for rehearing will be denied and the original opinion adhered to.

FORMER OPINION APPROVED. REHEARING DENIED.

MR. JUSTICE MCBRIDE, MR. JUSTICE BEAN and MR. JUSTICE HARRIS CONCUR.

Argued June 30, modified July 13, rehearing denied September 14, 1915.

HOWARD v. GERMAN-AMERICAN INS. CO.

(151 Pac. 477.)

From Jackson: ROBERT G. MORROW, Judge.

This is an action by S. T. Howard and George A. Morse against the German-American Insurance Company of New York. From a judgment for plaintiffs, defendant appeals. Reversed and rendered as to plaintiff Howard and affirmed as to plaintiff Morse.

MODIFIED. REHEARING DENIED.

For appellant there was a brief over the name of *Messrs. Veazie, McCourt & Veazie*, with an oral argument by *Mr. John McCourt*.

For respondents there was a brief over the names of *Messrs. Boggs & Wilson* and *Mr. William I. Vawter*, with an oral argument by *Mr. O. C. Boggs*.

Department 2. MR. JUSTICE EAKIN delivered the opinion of the court.

This is an action to recover the amount of loss by fire from the defendant company in which plaintiffs were insured. The action is by the same plaintiffs to recover for a loss by the same fire as mentioned in the case of *Howard et al. v. Horticultural Fire Relief, ante*, p. 349 (150 Pac. 270), but for an additional loss under the policy here involved. The same defense is set up and the same questions arose in this case as are decided in that, and what is said in that opinion applies equally to the facts in this case and is controlling here.

For the reasons stated in that opinion, the judgment in this case is reversed and one rendered in favor of defendant as to the claim of plaintiff S. T. Howard, and affirmed as to the judgment in favor of George A. Morse. **MODIFIED. REHEARING DENIED.**

MR. JUSTICE McBRIDE, MR. JUSTICE BEAN and MR. JUSTICE HARRIS CONCUR.

MR. CHIEF JUSTICE MOORE taking no part in the consideration of this case.

Argued June 30, modified July 13, rehearing denied September 14, 1915.

HOWARD v. HARTFORD INS. CO.

(151 Pac. 477.)

From Jackson: **ROBERT G. MORROW, Judge.**

This is an action by S. T. Howard and George A. Morse against the Hartford Fire Insurance Company of Hartford, Connecticut. From a judgment for plaintiffs, defendant appeals. Reversed and rendered for defendant as to Howard and affirmed as to the judgment for Morse.

MODIFIED. REHEARING DENIED.

For appellant there was a brief over the name of *Messrs. Veazie, McCourt & Veazie*, with an oral argument by *Mr. John McCourt*.

For respondents there was a brief over the names of *Messrs. Boggs & Wilson* and *Mr. William I. Vawter*, with an oral argument by *Mr. O. C. Boggs*.

Department 2. MR. JUSTICE EAKIN delivered the opinion of the court.

This is an action to recover the amount of loss by fire from defendant company in which plaintiffs were insured. The action is by the same plaintiffs to recover for a loss by the same fire as mentioned in the case of *Howard et al. v. Horticultural Fire Relief, ante*, p. 349 (150 Pac. 270), but for an additional loss under the policy here involved. The same defense is set up, and the same questions arose in this case, as are decided in that, and what is said in that opinion applies equally to the facts in this case, and is controlling here.

For the reasons stated in that opinion, the judgment in this case is reversed and one rendered in favor of defendant as to the claim of plaintiff S. T. Howard, and affirmed as to the judgment in favor of George A. Morse.

MODIFIED. REHEARING DENIED.

MR. JUSTICE MCBRIDE, MR. JUSTICE BEAN and MR. JUSTICE HARRIS concur.

MR. CHIEF JUSTICE MOORE takes no part in the consideration of this case.

Argued May 6, modified June 8, rehearing denied September 14, 1915.

UNION CREDIT ASSN. v. CORSON.

(149 Pac. 318.)

Fraudulent Conveyances—Elements of Fraud—Transfer to Co-owner.

1. Where plaintiff's debtor and another jointly owned an equity in certain land, the payment on which was due, and the debtor could not pay his share thereof, an agreement whereby he conveyed his interest to his co-owner, who mortgaged the land to raise the money necessary to complete the payment, and gave the debtor a contract

to convey his interest to him upon his paying his share of the purchase price, shows no intention to defraud plaintiff, since his debtor's equity was still subject to the payment of his debt.

Judgment—Lien—Equity.

2. The fact that plaintiff had a judgment against his debtor which was no lien upon the debtor's equity in the land gave him no rights thereto superior to those of the co-owner.

Creditor's Suit—Conditions Precedent—Recovery of Judgment.

3. A creditor cannot maintain a creditor's bill to subject his debtor's equity in land to the payment of the debt before reducing his debt to judgment at law.

[As to demands which will support creditor's suits, see note in 66 Am. St. Rep. 271.]

Payment—Application—Unsecured Debt.

Where one co-owner of land was indebted to the other, the proceeds of sales by the latter will be applied to the unsecured portion of the debt, not to that secured on the land, in the absence of specific directions by the debtor for the application.

From Malheur: DALTON BIGGS, Judge.

This is a suit by the Union Credit Association, a corporation, against J. M. P. Corson and John W. Corson, and others. From a decree in favor of plaintiff, the named defendants appeal. MODIFIED.

For appellants there was a brief over the names of *Mr. John W. Corson, Mr. George E. Davis* and *Messrs. McCulloch & Wood*, with an oral argument by *Mr. Corson*.

For respondent there was a brief and an oral argument by *Mr. H. C. Eastham*.

In Banc. MR. JUSTICE McBRIDE delivered the opinion of the court.

This was a creditor's bill to subject certain realty held by defendants to the lien of plaintiff's judgment. The pleadings are lengthy. Instead of giving them in detail, we give the facts as we find them from the testimony. On October 24, 1908, the defendant Gar-

rett and one Dills entered into a contract with L. J. Hadley to purchase certain lands described in the complaint for the sum of \$7,700, paying \$3,000 in cash, and agreeing to pay \$4,700, with interest, upon the payment of which as agreed they were to receive a deed. Of the \$3,000 paid down Garrett paid \$2,000 and Dills \$1,000, and it was understood that Garrett was to have a two-thirds interest, and Dills a one-third interest. Thereafter, on January 20, 1910, Mrs. Corson purchased one half of Garrett's interest for the sum of \$1,000, and later purchased Dills' interest for \$1,500; thus becoming the owner of a two-thirds interest in the contract for the purchase of the property, which at some date not disclosed in the testimony was platted into smaller tracts or lots, some of which were sold to various persons; Garrett being the active agent in effecting most of the sales. On April 13, 1911, plaintiff began an action at law against Garrett to recover upon a promissory note for \$870, and interest, and upon July 10th recovered judgment for the amount claimed. On May 11, 1911, plaintiff began a suit against Garrett setting up its claim against him and the pendency of the action to recover it, and alleging that Garrett was the owner of an equity in said lands, but that the legal title was in Hadley, subject to the payment to him by Garrett and Dills of the balance of the purchase price, to wit, about \$3,000, with accrued interest; that Garrett had abandoned his residence in Oregon, and had no property in the state or elsewhere which could be subjected to the payment of plaintiff's claim, except his interest in the Hadley property; and that, unless restrained, he would sell and dispose of the same with intent to defraud his creditors. The complaint set forth every fact necessary to constitute a good credi-

tor's bill, except the fact of having obtained judgment in its action at law, and prayed for the appointment of a receiver to take and hold Garrett's interest in the property until the action at law should be determined, and that in the meantime Garrett should be enjoined from in any manner conveying away, dealing with, or encumbering the property or the Hadley contract during the pendency of the action at law. The restraining order was issued, and J. P. Dunaway was appointed receiver, but, beyond demanding possession of the property from Garrett and Hadley, he did nothing with respect to the premises, having no actual possession thereof. On October 30, 1911, Dunaway came into court and asked for and obtained an order restraining Mr. and Mrs. Corson from in any way dealing with the property in dispute, which order was dissolved on November 11th. On October 24, 1911, this being the last day specified in the Hadley, Garrett, and Dills contract for the payment of the balance of the purchase money, Mrs. Corson, in order to close the matter, was compelled to pay the whole sum, amounting to \$3,385, \$2,000 of which she borrowed from George A. Brown, and \$1,385 from the First National Bank of Vale. At this time Hadley was very importunate for the payment of the money due him, and threatened to declare the contract forfeited if payment was not immediately made. For some reason Mr. Brown did not wish to deal with Garrett, so, in order to obtain the money, it was arranged that Garrett should convey his one-third interest to Mrs. Corson, who should then execute a mortgage to Brown upon the whole tract. This was done; Mrs. Corson giving Garrett a contract whereby she agreed to convey to him a half interest in the property for the sum of

\$2,140, to be paid on or before April 23, 1912, with interest from date at 10 per cent per annum, Garrett to assume and pay one half of the \$2,000 mortgage to Brown and one half of the tax assessments upon the property. After this agreement had been executed, and before Mrs. Corson had completed the loan from Brown, Garrett suggested that, if he paid \$2,140 for the property and half the mortgage, he would be paying \$1,000 too much; and thereupon, as the bank was about to close, Mrs. Corson, to save redrafting the contract, gave him a receipt for \$1,000 to apply on it, making his actual indebtedness in that behalf \$1,140. There is no evidence that any matters or accounts between Mrs. Corson and Garrett were discussed, considered or adjusted at this time. The sole object of the Corsons and Garrett seems to have been to provide means to meet an immediate emergency; namely, the danger of allowing the time fixed for the final payment to Hadley to expire without the purchasers having complied with the terms of their agreement. Having, by the arrangement with Garrett and Brown and a further loan from the First National Bank of Vale, secured the money for this purpose, Mrs. Corson paid Hadley and secured a deed to the property.

1. Considering her large interest in the land and the danger of litigation likely to have arisen from delay, this, so far from indicating any attempt on her part to defraud plaintiff, seems only to have been a natural and necessary course for her to pursue under all the circumstances. She could not have tendered Hadley two thirds of the balance due, and demanded a conveyance of a two-thirds interest in the land; and the testimony indicates that Brown declined to loan upon any other terms than the arrangement finally agreed

upon. There is no fraud shown or indicated in the transaction.

2. The fact that plaintiff had a judgment against Garrett which was not a lien upon his equity in the contract gave the plaintiff no superior right over Mrs. Corson.

3. The injunction suit begun before judgment was obtained and the appointment of a receiver under it was a void proceeding so far as fixing an equitable lien on the land was concerned. It was an attempt to bring a creditor's bill without first obtaining a judgment at law, and this, under all the authorities, cannot be done: Smith, *Equitable Remedies of Creditors*, § 27, and cases there cited. It follows that, whatever the efficacy of the restraining order issued against Garrett as to imparting actual notice of plaintiff's claim to the defendant Corson, it had no legal effect if the dealings on Mrs. Corson's part were *bona fide*, of which fact we are satisfied. She had a perfect right to protect her own interests, and in doing so to take the assignment from Garrett of his interest, although she may have known that other persons had equally meritorious claims against him. The transaction between Garrett and Mrs. Corson would hardly seem to prejudice plaintiff's right to subject his equitable interest in the property to the lien of its judgment. Before the transfer Garrett held a one-third interest under the Hadley contract, the whole property being burdened with the amount of the unpaid purchase price, amounting to \$3,385. By the transfer to Mrs. Corson he has a half interest; the whole property being burdened by the Brown mortgage for \$2,000, and interest, and by the \$1,140, and interest, due Mrs. Corson. Plaintiff, after obtaining its judgment, had made

no further move to subject Garrett's interest in the property to a lien or to secure an order of sale until Mrs. Corson had purchased the property. From July 11th until October 30th plaintiff had a judgment which furnished it ample ground to subject Garrett's interest to sale by a proceeding in equity. It seems to have relied upon the futile proceedings begun before the judgment at law was rendered against Garrett to tie up the property indefinitely. We fail to see where it has any equities superior to those of Mrs. Corson, who came forward and put up her money to complete the contract and took the risk of getting it back out of the property. The decree of the court below seems to have been based upon the theory that the agreement of October 24, 1911, constituted an account stated between Mrs. Corson and Garrett, and obliterated any other claims she may have had against him up to that date. This assumption is not supported by the testimony. We think it is fairly shown that at the time this option was given Garrett was indebted to Mrs. Corson in sums which aggregate \$3,137, the amount of which indebtedness was unknown at that time. It is also in evidence that Mrs. Corson has received from sales of property since the contract of October 24, 1911, \$2,330, and has disbursed of that sum \$666.76 on account of the property, leaving a balance on hand of \$1,663.24, out of which Garrett should be given a credit of \$831.62. The Circuit Court, having concluded that all previous transactions between the parties were settled by the contract of October 24, 1911, placed this \$831.62 to Garrett's credit upon the \$1,140 admitted on all sides to be due Mrs. Corson from Garrett upon the contract, and gave her a lien upon Garrett's supposed interest for \$308.38.

4. But it is only equitable to treat one half the amounts received by Mrs. Corson from sales of property and conditionally due to Garrett as general payments upon his account to be applied in the absence of any specific direction from Garrett or any specific application by her as equity applies such payments; the general rule being that in such cases the payment or credit should be applied first upon the unsecured debt. This would leave her with a lien upon Garrett's interest in the land amounting to \$1,140, with interest at the rate of 10 per cent per annum from October 24, 1911, instead of \$308.38, as found in the decree of the Circuit Court. In our opinion, the Hadley agreement was not an option to purchase, but a sale leaving the legal title to the property in the vendor as security for the payment of the purchase price; and, while the agreement of Garrett and Mrs. Corson is worded differently, yet, considering his previous interest in the property and the purposes for which the conveyance was made, we are satisfied that he has such an interest in it as can be subject to sale in equity for the payment of his debts.

The decree of the Circuit Court will therefore be modified so that the interest of Garrett shall be sold as upon execution, subject, however, to a lien for one half of the amount due upon the Brown mortgage, and out of the proceeds of the sale Mrs. Corson shall first receive the sum of \$1,140, with interest at 10 per cent from October 24, 1911; second, there shall be paid to plaintiff the amount of its judgment, costs, and disbursements; and, third, if within 30 days after the rendition of this decree Mrs. Corson elect to pay and shall pay into court the amount of plaintiff's judgment at law against Garrett, and the costs accruing thereon,

she shall have a further decree of this court declaring the amount so paid a lien on Garrett's interest, in addition to the sum of \$1,140 due upon the purchase price; further, that she now have decree against Garrett for the balance due her on account of the balance of moneys retained by Garrett and by her expended in his behalf, which amount we fix at \$2,306.48, but which sum shall be subject to and subsequent to the lien of plaintiff's judgment and of the Brown mortgage. Neither party shall recover costs either in this court or in the Circuit Court.

MODIFIED. REHEARING DENIED.

Argued June 2, reversed June 29, rehearing denied September 14, 1915.

UNITED STATES FIDELITY CO. v. MARTIN.

(149 Pac. 1023.)

Appeal and Error—Findings—Conclusiveness.

1. Findings are conclusive on appeal, unless the court finds that there is no evidence to support them.

Judgment—Conclusiveness—Former Adjudication.

2. A defendant in an action in a court of a sister state procured from a surety company a bond for the release of property attached by plaintiff therein. A third person executed to the surety company an indemnity bond conditioned on saving it harmless against all suits, actions, debts, damages, charges and expenses. Plaintiff in the action recovered judgment subsequent to his agreement to dismiss, in consideration of a payment in full settlement by defendant who had no knowledge of the trial. The third person had notice of the trial and participated therein. *Held* that, under the full faith and credit clause of the Constitution, the judgment was conclusive against the third person on his bond to indemnify the surety company satisfying the judgment, though the third person sought to show that under the laws of the sister state a new trial could be had against a judgment obtained by fraud or surprise, and that the surety company refused to take any action to obtain a new trial.

Payment—Receipt—Effect.

3. A receipt is only *prima facie* evidence of its statements.

Evidence—Parol Evidence—Contracts—Consideration.

4. Under Section 798, subdivision 3, L. O. L., providing that the truth of facts recited in a written instrument is conclusively proved

as between the parties thereto, but this rule does not apply to the recital of a consideration, a consideration expressed in a writing may be inquired into.

[As to when and how consideration must be expressed, see note in 60 Am. St. Rep. 432.]

Judgment—Foreign Judgment—Conclusiveness.

5. Under the full faith and credit clause of the federal Constitution and Section 761, L. O. L., providing that the effect of a judicial record of a sister state is the same in this state as in the sister state, the court may inquire whether a court of a sister state rendering a judgment relied on had jurisdiction of the parties and of the subject matter, but beyond that it cannot go.

From Multnomah: WILLIAM N. GATENS, Judge.

In Banc. Statement by MR. JUSTICE BURNETT.

This is an action by the United States Fidelity & Guaranty Company, a corporation, against G. F. Martin and C. A. Sheppard. The record discloses the following state of facts:

The plaintiff, a Maryland corporation authorized to operate in Oregon, avers substantially that the defendants applied to it to furnish a redelivery bond to secure the release of property attached in an action in the Superior Court of Clarke County, Washington, wherein E. M. Meach was plaintiff and C. Schley, trading as Vancouver Bill Posting Company, and S. S. S. Realty Company, was defendant. It furnished the bond and at the time, as part of the same transaction, took from the defendants here an indemnity bond in the sum of \$1,550, which recited the terms of the redelivery undertaking and stated its own conditions as follows:

“Now the condition of the above obligation is such that if the above-bounden indemnitors, their executors or administrators, shall at all times hereafter save harmless and keep indemnified the said United States Fidelity & Guaranty Company, its successors and assigns, against all suits, actions, debts, damages, costs,

charges and expenses, including court costs and counsel fees at law or in equity, and against all loss and damages whatever, that shall or may at any time hereafter happen or accrue to the said United States Fidelity & Guaranty Company, its successors or assigns, for or by reason of the suretyship of the said United States Fidelity & Guaranty Company, as aforesaid, or any continuation thereof, then this obligation to be void and of no effect, otherwise to be and remain in full force and virtue in law.

“And in order further to secure and indemnify the said United States Fidelity & Guaranty Company from and against any loss and expense that may occur and accrue to it because of the execution of the said bond, and as part of the consideration thereof, the said indemnitors do hereby authorize and empower any attorney of record, of this state or of any other state, named or to be named by the said United States Fidelity & Guaranty Company, to appear for them at any time after as well as during any term of court, and after as well as during office hours, and in their name to confess and have entered up a judgment against them in any court of this or of any other state of the United States or in any court of this province or of any other province of the Dominion of Canada, in favor of the said United States Fidelity & Guaranty Company for the sum of \$1,550.”

The complaint further narrates the recovery of judgment in the Washington action on September 11, 1911, in favor of the plaintiff and against the defendant in the sum of \$737.26; that the defendants refused to pay it after repeated demands by the plaintiff to that end, in consequence of which the plaintiff was compelled to and did pay the same on July 3, 1912, in principal, interest, and costs, the full amount of \$772.15. Further demands upon the defendants for reimbursement are alleged, and it is said that by reason of the default of the defendants the plaintiff has

been compelled to prosecute the action at an additional expense of \$75 for attorney's fees. The primary pleading concludes with a demand for judgment for \$847.15, with interest on the amount paid in satisfaction of the Washington judgment from the date of payment.

Denying most of the allegations of the complaint except as afterward qualified, only the defendant Shepard answered. He admitted the execution and delivery of both the redelivery bond and the indemnity bond as stated in the complaint. He says that, after the release of the attached property by virtue of the bond executed by the plaintiff, the parties to the Washington action made a complete settlement of the same as evidenced by the following writing:

“Portland, Oregon, January 19, 1911.

“Received from the Northwest Bill Posting Company four hundred sixty-five and 50-100ths (\$465.50) dollars in full settlement of all claims to date for which amount I agree to dismiss the suit now pending in the Superior Court of the state of Washington, for the county of Clarke, in which I am plaintiff and C. Schley and the Northwest Bill Posting Company is defendant.

“E. M. MEACH.”

He charges that afterward the plaintiff in that action refused to dismiss the same, but brought it on for trial and secured the judgment already mentioned in violation of his agreement. The defendant states that after the rendition of the judgment and demand made upon the plaintiff here for its liquidation, and it had called upon him to pay the same, he informed the plaintiff of the agreement and that said judgment had been wrongfully and unlawfully obtained in violation thereof; that the plaintiff there was not entitled to the judgment in question, and that it was illegal and void

and of no force and effect; that he notified the plaintiff on those grounds that it was his intention to institute a suit in the name of the plaintiff corporation for the purpose of having the judgment set aside. He further says that:

He "at that time presented to this plaintiff a petition prepared by counsel who had been employed by this answering defendant setting up facts which showed fraud upon the part of the said E. M. Meach, and facts sufficient to have warranted said court in setting aside said judgment against the said C. Schley and this plaintiff and facts sufficient to properly advise this plaintiff of the truth of all of the statements contained in said complaint, and requested this plaintiff, through its proper officers, to cause said complaint to be verified. * * "

He also avers that:

"If said suit had been permitted to have been instituted and carried on, the same would have been successful, and that said judgment would have been set aside and held for naught, and this plaintiff would not have been liable for or been compelled to pay said judgment or any part thereof."

In brief, the answer does not complain of anything which the plaintiff here did or refused to do in the Washington action; but the essence of the affirmative answer is that the plaintiff declined to allow the use of its name by the defendant Sheppard in the prosecution of a new and independent suit to set aside the Washington judgment which it was compelled to pay.

The reply traversed the allegations of the answer in material particulars and averred, in substance, that the laws of Washington provide for a new trial of an action as against a judgment obtained by fraud or surprise in the manner alleged by the answer and for an appeal within three months from the final decision of

an action, and that neither the defendant therein nor the defendants here took any steps to avail themselves of the prescribed procedure in that respect in that state; that, after the time for taking such appeal had elapsed, the present defendants instituted an original suit in their own name in the Superior Court of Clarke County, Washington, for the purpose of setting aside the judgment on the grounds which the defendant Sheppard here alleges; but that the same was decided adversely to them and that it was not until execution issued upon the judgment that the plaintiff here had paid the same. The Circuit Court heard this case without a jury, and after keeping it under advisement for some months adopted findings of fact and conclusions of law submitted to it by the plaintiff. These findings and conclusions are a substantial copy of the material allegations of the answer omitting charges of fraud and collusion on the part of plaintiff which were practically abandoned at the trial. The plaintiff propounded findings in its favor which were rejected by the court. A judgment was rendered for the defendants and the plaintiff appeals.

REVERSED. REHEARING DENIED.

For appellant there was a brief over the name of *Messrs. Beach, Simon & Nelson*, with an oral argument by *Mr. Roscoe C. Nelson*.

For respondent, C. A. Sheppard, there was a brief over the name of *Messrs. Sheppard & Brock*, with an oral argument by *Mr. Robert J. Brock*.

MR. JUSTICE BURNETT delivered the opinion of the court.

If we should concede that the defendant had a right to demand of the plaintiff that it commence in its own

name an independent suit to set aside the judgment which it afterward paid, still the answer of the defendant describing the petition he presented only states a conclusion of law. On the hypothesis that the plaintiff was compelled to accede to his request to commence a suit, he should have set forth the facts presented in the petition, so that the court here could determine as a matter of law whether or not the plaintiff was remiss in its duty to him in refusing to adopt the complaint presented. For all that appears in the answer, the complaint which he desired the plaintiff to subscribe was wholly insufficient for the purpose designed and would only have involved the plaintiff in further complications.

1, 2. Passing this point, however, we approach what we deem the vital question in the case, which is the force and effect of the Washington judgment. We remember that the findings of fact in the case are conclusive upon appeal unless the court on examination of the record contained in the bill of exceptions discerns that there is no evidence to support the findings. The first assignment of error is based upon the contention that the finding to the effect that the Washington action was settled before judgment therein was without foundation in the testimony. The proceedings of the Washington court in the action in question are in the record before us. They include the pleadings, the findings of the court, and the judgment. The complaint is for labor, capital, goods, wares and merchandise furnished by the plaintiff to the defendant between certain dates amounting to \$767.67, and alleges that no part of the same has been paid. The amended answer consists of a denial of the complaint, and a further and separate defense alleging the settle-

ment of the action after the commencement thereof and the execution of the writing already mentioned and counted upon by the defendant as a defense in the case at bar. The reply, after denying the allegations of the amended answer, further points out that the settlement had nothing to do with the defendant; that the plaintiff never at any time had any transactions with the Northwest Bill Posting Company, nor did he bring an action against that institution. It further avers that the plaintiff had a compromise agreement with one Sheppard, the answering defendant here, wherein the latter agreed to pay the plaintiff \$465 in March of the year 1911, together with all outstanding bills in Vancouver, Washington, against the defendant in that action; and that the plaintiff agreed that the action in question should not be prosecuted at that time but should remain until March, 1911, when, if the compromise agreement had not been carried out by Sheppard, the plaintiff should proceed to judgment in the action. The record of the trial in the Washington court recites that the cause came on to be heard on its merits; that the plaintiff appeared in person and by his attorney, George B. Simpson, that the defendant appeared by his attorney, J. B. Stapleton; and that after hearing the testimony of witnesses and argument of counsel for both parties the court made findings of fact. It is sufficient to say of these that they were favorable to the plaintiff in the action; that the redelivery bond had been executed by the plaintiff here; and, as to the settlement based upon the receipt already quoted, the finding is thus:

“That the receipt signed by the plaintiff and admitted herein as evidence is not conclusive and was contradicted and entirely discredited by the oral evidence of the plaintiff, and that said receipt was only

accepted in settlement, upon condition that it be paid at maturity, and the other bills mentioned in plaintiff's complaint be settled, which conditions have not been met."

Upon these findings of fact the court entered conclusions of law to the effect that the plaintiff should have judgment against the defendant for \$666.26, with interest amounting to \$32.19, together with his costs, and should also have judgment against the plaintiff here as surety on the redelivery bond in the sum already stated. The judgment was entered accordingly against the defendant in the action and this plaintiff as surety on the redelivery bond.

It is written large throughout the pleadings and evidence in this case that the defendant Sheppard had notice of the pendency of the action and that he applied to the plaintiff for the redelivery bond to be used in that litigation. In furtherance of his undertaking to save this plaintiff harmless on its stipulation, he procured the receipt upon which he relies. It appears in evidence without dispute out of his own mouth that prior to the trial of the action he was notified by the attorney of record for the defendant that the action would be brought to trial. He testifies that he furnished to the counsel for the defendant there the writing already quoted, signed by Meach. The record shows that the answer was amended and the question of settlement raised upon the writing; that the defense was interposed based upon that instrument; that the identical proposition upon which the defendant here relies was litigated in the Washington court, where both parties were represented by their attorneys of record; and that the decision of that tribunal to which the parties submitted themselves was adverse to the

contention of the defendant here. What, then, is the effect to be given to that judgment upon the question of settlement? The answer is found in Section 1 of Article IV of the Constitution of the United States:

“Full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state.”

3, 4. On the question involved, namely, whether or not the action had been settled, the judgment of the Washington court having jurisdiction of the persons and of the subject matter is conclusive as against anything here alleged by the defendant. To uphold the defense in face of such a record is to discredit the judicial proceeding of a sister state. It is hornbook law that a receipt is only *prima facie* evidence of its statements. It is equally primary learning that the consideration expressed in a writing may be inquired into: Section 798, L. O. L., subd. 3. It is not necessary to further speculate on the reasons underlying the decision of the Washington court on this point, for we can well surmise that there was evidence before it, not only qualifying the terms of the settlement, but also the consideration upon which it was supposed to have been based. The instrument upon which he relies cannot be allowed to discredit the judicial determination of the Washington court. Such a holding would be in direct contravention of the mandate of the national Constitution already noted. It would be to uphold a private writing in the very face of a judicial record condemning it. The resulting situation, therefore, is that, on the record presented, the court of trial in the instant case could not lawfully reach any other conclusion except that the action had not been settled as claimed by the defendant Sheppard. The neces-

sary deduction is that there was no evidence to sustain the finding of our Circuit Court to the contrary.

As before stated, it is unquestioned in the testimony that the defendant Sheppard had notice of the pendency of the Washington action from its conception; that he knew that the same was to be brought to trial; that to a certain extent he availed himself of the opportunity to interpose his defense; and that it was pleaded there. He states in his testimony that, having furnished the data to the counsel for the defendant in that action, he himself went away to another point in that state to attend to some other litigation, and hence was not present at the trial; but he does not pretend that he was lured away by any action of the plaintiff here. Having notice of the pendency of the action and that it would be brought to trial and being in position to urge the defense and to carry out the terms of his bond to save the plaintiff harmless, he is bound by the resulting judgment against the plaintiff here. In *Carroll v. Nodine*, 41 Or. 412 (69 Pac. 51, 93 Am. St. Rep. 743), the only notice given to the defendant indemnitor of the pendency of the action was that she was called as a witness and attended at the trial resulting in the judgment against her indemnitee, and it was there held that she was sufficiently vouched to make the judgment conclusive upon her. Again, in *Astoria v. Astoria & Columbia Riv. R. Co.*, 67 Or. 538 (136 Pac. 645, 49 L. R. A. (N. S.) 404, 5 N. C. C. A. 442), this court held that, where the indemnitor has notice of the action and an opportunity to urge the defense, the judgment in that action is conclusive of the facts thereby established and cannot again be the subject of litigation between the indemnitor and the indemnitee. Mr. Justice McNARY, who wrote the opinion, adopts the follow-

ing language in *Oceanic Steam Nav. Co. v. Campania Transatlantica Espanola*, 144 N. Y. 663 (39 N. E. 360):

"It is sufficient that the party against whom ultimate liability is claimed is fully and fairly informed of the claim and that the action is pending with full opportunity to defend or to participate in the defense. If he then neglects or refuses to make any defense he may have, the judgment will bind him in the same way and to the same extent as if he had been made a party to the record."

In *Bridgeport Fire & Marine Ins. Co. v. Wilson*, 34 N. Y. 275, the rule is thus stated:

"(1) Where the covenantor expressly makes his liability depend on the event of a litigation to which he is not a party, and stipulates to abide the result; and (2) where the covenant is one of general indemnity merely, against claims or suits. * * In cases of the first class, the judgment is conclusive evidence against the indemnitor, although he was not a party, and had no notice, for its recovery is the event against which he covenanted."

The court goes on to hold, however, that in cases of the second class, where the indemnitor had notice of the pendency of the action and had opportunity to urge his defense, he is bound by the result of the litigation. Again, in *Village of Port Jervis v. First National Bank*, 96 N. Y. 550, it is said:

"But if the party who is ultimately responsible has notice of the pendency of an action against his indemnitee and is given an opportunity to defend, and neglects it, he is still bound by the result of the action and estopped from controverting in an action subsequently brought against him by such indemnitee the facts which were litigated in the original action."

In cases of the first class mentioned in *Bridgeport Ins. Co. v. Wilson*, the reason for notice failed, and

the necessity therefor is obviated. This is applicable to the instant case in the following manner: The answering defendant assumed responsibility to the plaintiff for the result of the action in which it furnished the indemnity undertaking. He agreed to protect it from that particular action, and he is bound by his agreement irrespective of notice because he had notice from the beginning of the very proceeding against which he guaranteed the plaintiff. He subsequently assumed to intermeddle in the litigation. In a way he assumed the disposition of that action, and, having put his hand to the plow, he was bound not to turn back, but to continue his efforts to a successful conclusion. It is not pretended in his pleadings that he gave the plaintiff any notice of his transaction with Meach or of his settlement of the controversy until after rendition of the judgment. The plaintiff is not to blame if the labors of the defendant proved abortive. Moreover, the fact that the plaintiff, as he himself testifies, had notice of the purpose to bring the action to trial after the alleged settlement, puts him in the second class mentioned in *Bridgeport Ins. Co. v. Wilson*; and on account of that notice the judgment is conclusive upon him from any point of view. In brief, having undertaken to save the plaintiff harmless from the result of a designated action, it was incumbent upon the defendant from the beginning to accomplish that result. Not having done so, he is liable upon his obligation. The following precedents illustrate the doctrine more fully: *Chamberlain v. Preble*, 11 Allen (Mass.), 370; *Rape-lye v. Prince*, 4 Hill. (N. Y.) 119 (40 Am. Dec. 267); notes to *Ballentine v. Fenn*, 40 L. R. A. (N. S.) 698, 723, and *Baltimore & O. R. R. Co. v. Howard County*, 40 L. R. A. (N. S.) 1172; *Chicago v. Robbins*, 67 U. S.

(2 Black) 418 (17 L. Ed. 298); *Robbins v. Chicago*, 71 U. S. (4 Wall.) 657 (18 L. Ed. 427); *Mayor v. Brady*, 151 N. Y. 611 (45 N. E. 1122); *Portland v. Richardson*, 54 Me. 46 (89 Am. Dec. 720); *Great N. Ry. Co. v. Akeley*, 88 Minn. 237 (92 N. W. 959); *Daskam v. Ullman*, 74 Wis. 474 (43 N. W. 321); *Davis v. Smith*, 79 Me. 351 (10 Atl. 55); *Woodworth v. Gorsline*, 30 Colo. 186 (69 Pac. 705, 58 L. R. A. 417); *Lovejoy v. Murray*, 3 Wall. 1 (18 L. Ed. 129); *Seattle v. Regan*, 52 Wash. 262 (100 Pac. 731, 132 Am. St. Rep. 963); *American Bonding Co. v. Dufur*, 49 Wash. 632 (96 Pac. 160). In 38 Albany Law J. 507, there is an exhaustive and able discussion of this question by Judge CORLISS, formerly of the Supreme Court of North Dakota, but now of the bar of this state.

5. Besides all this, by the other terms of his bond the defendant might be held to have waived all control over litigation of the question involved when he authorized the plaintiff to select any attorney of record to confess judgment against him on his liability; but upon this point we make no decision. In brief, we conclude that the judgment of the Washington court was conclusive upon the defendant as to the amount and fact of his liability to the plaintiff; that he cannot again litigate the matter of settlement of the action either directly or indirectly; and that as against that judgment he has no right to demand that the plaintiff here even nominally institute an independent suit to again litigate the questions there involved. He had free rein to operate in the proceedings in the action before the Washington court, and indeed took some measures there to prevent the judgment that ensued, but without avail. It is clear, and is not controverted, that nothing more can be done directly in the prosecution or defense

of that action. The judgment there ripened into a finality, and the plaintiff here was compelled to pay it. Our statute, expressing the doctrine of the full faith and credit clause of the national Constitution, says in Section 761, L. O. L.:

“The effect of a judicial record of a sister state is the same in this state as in the state where it was made.”

Final there, it is final here. We can inquire whether that tribunal had jurisdiction of the parties and of the subject matter, but further than that we cannot go. When these conditions appear, we must accept the determination of that court as conclusive without further inquiry. Such is the teaching of *Foshier v. Narver*, 24 Or. 441 (34 Pac. 21, 41 Am. St. Rep. 874). There the defendant was served with summons in Iowa in an action pending in a court in that state for the recovery of money due upon a promissory note. He suffered judgment to go against him there by default. An action to recover the amount of the judgment was instituted against him in Oregon. It appeared from the record that the Iowa court had jurisdiction of him and of the subject matter of the action, and he was denied the right to show in the court here that he had never signed the note; that he was not responsible for the instrument or the debt it represented; and that it was subscribed by a different person. The judgment was held to be conclusive even against the facts he offered to prove. The case of *De Vall v. De Vall*, 57 Or. 128 (109 Pac. 755, 110 Pac. 705), enunciates the same principle.

Having covenanted to save the plaintiff harmless from any judgment in the action wherein at his request it became a surety, the defendant formulated a plan,

in the shape of the receipt mentioned, which he thought would effect the desired result, all without the knowledge of the plaintiff. At his instance that paper was pleaded in the action mentioned, and the matter was fully litigated with a result adverse to his contention. Having exhausted his resources in that case, he now urges that he is exonerated because this plaintiff did not inaugurate new and independent litigation on security of his choosing. In short, for his undertaking to the plaintiff he would substitute the agreement expressed in the Meach receipt without the knowledge of the plaintiff and would compel the latter to enforce it after he had failed. To countenance the defendant's contention in the face of the judgment of the Washington court would be to say:

"We will not give faith or credit to that determination until we first shall have examined into what we assume to be the merits of the controversy there and ascertained for ourselves whether the decision is such as we would have rendered under the same circumstances."

We are forbidden to do this by the national Constitution, as well as by section 761, L. O. L. The Circuit Court was in error when it discredited the judgment of the court of a sister state in favor of the writing upon which the defendant depends; especially when it was before that court for consideration in that very action upon the contention here urged.

The decision of the Circuit Court is reversed and the cause remanded, with directions to that court to enter a judgment in favor of the plaintiff according to the prayer of the complaint.

REVERSED. REHEARING DENIED.

MR. JUSTICE BEAN delivered the following dissenting opinion.

I am unable to concur in the majority opinion.

This is an action upon an indemnity contract. The cause was tried by the court without the intervention of a jury. Findings of fact were made and a judgment rendered in favor of defendant C. A. Sheppard, from which plaintiff appeals. Defendant G. F. Martin made no defense.

The facts and circumstances of the case are nearly all detailed in the findings of the trial court, the substance of which is as follows: The plaintiff is a Maryland corporation authorized to do business in Oregon. On December 2, 1910, one E. M. Meach had instituted an action in the Superior Court of Clarke County, Washington, against one C. Schley, doing business as the Vancouver Bill Posting Company and the S. S. S. Realty Company, to recover \$767.67, and caused a writ of attachment to be issued and levied upon his property. Schley made application to the plaintiff to execute a bond in the sum of \$1,536 conditioned that Schley would pay any judgment that might be rendered against him in the action, for the purpose of having the property released from the attachment. The bond was executed and the property released by the sheriff. At the time the plaintiff company signed the bond, C. A. Sheppard and G. F. Martin executed to it an indemnity agreement indemnifying and holding it harmless from any liability upon the bond signed as surety for Schley. On January 19, 1911, the defendant Schley made a full and complete settlement of the action with plaintiff E. M. Meach and by the terms thereof agreed in writing to cause it to be dismissed. The agreement is as follows:

“Portland, Oregon, January 19, 1911.

“Received from the Northwest Bill Posting Company four hundred sixty-five and 50/100ths (\$465.50) dollars in full settlement of all claims to date for which amount I agree to dismiss the suit now pending in the Superior Court of the State of Washington for the county of Clarke in which I am plaintiff and C. Schley and the Northwest Bill Posting Company is defendant.

“[Signed] E. M. MEACH.”

Such writing was executed by E. M. Meach with the purpose and intention of being a full and complete settlement of the suit hereinbefore mentioned, and by it Meach agreed to dismiss the action. Relying upon the written agreement of Meach to dismiss the action, and believing that the same had been fully settled and satisfied, C. Schley left the State of Washington and has remained away ever since that time. Thereafter in violation of his agreement of settlement with Schley and with the purpose and intention of wronging, defrauding and cheating him and all other parties interested in such action, after ascertaining that Schley had left the State of Washington and that his whereabouts were at the time unknown, E. M. Meach refused to dismiss the action and caused the same to be set down for trial without notifying Schley, or the surety upon his bond, or any other person interested therein. Thereafter, in violation of his written agreement to dismiss the action, he wrongfully, unlawfully and by fraud practiced upon the court caused the same to be tried without the knowledge of Schley and without the latter being present in said court to protect his interest thereunder. By reason of this fraud practiced upon the court and upon Schley, Meach caused a judgment for the sum of \$737.26 to be rendered in that action in his favor and against defendant Schley and the

United States Fidelity & Guaranty Company which had signed the attachment bond. Some time after obtaining such judgment, Meach notified the plaintiff herein as surety upon the bond of Schley and demanded payment of the judgment. The plaintiff company notified this defendant C. A. Sheppard, who had signed the indemnity agreement, of the judgment rendered against Schley and demanded of him as indemnitor that he pay the judgment. Immediately upon receipt of this notice, C. A. Sheppard notified the guaranty company of the facts hereinbefore stated and of the fact that such judgment had been wrongfully and unlawfully obtained in violation of the written agreement of E. M. Meach to dismiss the action, and advised the company, that the claim of Meach in that action had been fully settled and discharged; that the pretended judgment obtained by him had been wrongfully and illegally procured and was not of any force or effect; that it was the intention and desire of the defendant Sheppard to institute a suit in said court in the name of the plaintiff, the United States Fidelity & Guaranty Company, for the purpose of having such judgment set aside upon the ground that the same had been wrongfully obtained. Defendant Sheppard also notified plaintiff that he had employed, at his own expense and without costs to the plaintiff, an attorney who was authorized to practice law in the State of Washington, and who was familiar with the practice therein, for the purpose of bringing such suit. He further notified the plaintiff that he had arranged for a bond, as required by law, that he would pay the costs and expenses of said suit, that an attorney was employed by him who was familiar with all the facts hereinbefore stated and would verify said complaint, and asked permission of

the plaintiff herein to institute and carry on said suit for the purpose of setting aside the pretended judgment in the name of plaintiff herein. The plaintiff refused to permit such suit to be instituted or carried on in its name or to permit this defendant to take any action in the name of the United States Fidelity & Guaranty Company for the purpose of having the judgment in question set aside and annulled. In this refusal the plaintiff acted arbitrarily and in violation of the rights of Sheppard, as indemnitor, thereby willfully and unlawfully prevented defendant Sheppard from securing any protection against such judgment, and thereby deprived him of a substantial right belonging to him as indemnitor. At the time Sheppard signed the indemnity agreement to the plaintiff, he received no security therefor, which plaintiff well knew. In paying the judgment the plaintiff herein did so against the protest and objection of Sheppard and in violation of its duty to him as indemnitor.

Based on the findings of fact, the court made the following conclusions of law:

"That the said plaintiff, by reason of its refusal to permit the said defendant, Sheppard to institute and carry on a suit in its name for the purpose of having said judgment set aside, deprived the indemnitor Sheppard of a substantial right, and thereby released him upon his indemnity agreement. That in paying said judgment against the objection and protest of the defendant Sheppard herein," and in said refusal, Sheppard is released from all liability to the plaintiff."

A decree was entered in favor of defendant and for costs. Plaintiff objected to the findings of fact made by the trial court for the reason that the same were not supported by the evidence and requested findings in favor of the plaintiff.

It appears that in June, 1911, a few days before the case of *Meach v. Schley* was set for trial, J. P. Stapleton, attorney for Schley, informed Sheppard in regard thereto, and the latter told Stapleton and George B. Simpson, attorney for Meach, that the latter's claim against Schley had been settled, and Simpson intimated that if that were true he would dismiss that action. Sheppard forwarded the receipt to Stapleton for Simpson's inspection. Defendant C. A. Sheppard, an attorney of Portland, testified in substance upon the trial that on January 19, 1911, Meach, who had been a former business partner of Schley, came to his office; that he figured with him and reduced his claim to \$465; that he asked him if he would take the note of the Northwest Bill Posting Company, and Meach said he would provided Sheppard would sign it personally; that he told him he would not do anything of the kind; that Meach finally accepted the note of the Northwest Bill Posting Company and agreed to look to that company and to it alone for payment. This witness further stated that Meach executed the receipt and agreement, and he (Sheppard) notified Schley and the guaranty company; that Meach said he would dismiss the suit; that he heard nothing more about the matter until June 24, 1911, when he sent the receipt to Schley's attorney at Vancouver, Washington, and went to South Bend in that state to try a lawsuit, where he was for about 14 days; that the case was tried in violation of that agreement; that the surety company would not sign the complaint or institute a suit to set the judgment aside unless Sheppard put up cash to cover the judgment and costs; that the company demanded \$1,550 in cash and sufficient to cover costs; and that if the company paid the judgment it was without his con-

sent. He further stated that they offered a letter to save the company harmless on account of costs in the suit; that Mr. Hamaker offered to look to him for attorney's fees and to save it harmless on account of attorney's fees; that at first he (Sheppard) asked the company to put up an injunction bond which it refused, and then he told it he would get the bond.

It appears that the amount of cash demanded by the company to be deposited was afterward reduced to \$800. The record disclosed that there was a lengthy correspondence between one G. E. Hamaker, the attorney whom Sheppard employed to institute a suit to set aside the judgment, and the representatives of the guaranty company at Portland, and at Tacoma, Washington, which was finally submitted to the home office of the company at Baltimore, Maryland. The correspondence culminated in the refusal of the company to assist the indemnitor, as shown by the following letter: "United States Fidelity & Guaranty Company, Baltimore, Md.

"November 18th, 1911.

"Claim #32769.

"Messrs. Hubbert & Stanton, Tacoma, Washington—

"Gentlemen: Re Schley for the Northwest Bill Posting Company. We have your communication of November 10th with inclosures and have considered this proposition with a great deal of interest. In the first place, it is clear to us that we should not sign the complaint or affidavit submitted. The allegations of fraudulent practice on the part of the defendants' attorney are matters entirely without our knowledge and, moreover, it is contrary to our policy to ever make allegation of this sort in any suit if it can be avoided, especially when we have no direct interest as in this case. * * If as Mr. Hamaker states there is no other manner of securing justice to his clients, we regret the situation but do not see that the company is under any

obligation to take care of his clients; on the other hand, they obligated themselves to hold this company harmless and we must insist upon their complying with this obligation. * * ”

The conclusion reached by the home office of the company was communicated to Sheppard as shown by the following letter:

“United States Fidelity & Guaranty Company, Baltimore, Md.

“Portland, Oregon, Nov. 28th, 1911.

“Messrs. Hubbert & Stanton, Tacoma, Washington—

“Gentlemen:—Re T#32769, C. Schley for the Northwest Bill Posting Company. Yours of the 24th instant in the above connection was duly received, together with copy of letter addressed to you by the home office of the company. We are, accordingly, advising the attorney for our indemnitors that the company has refused to assist them in this matter. The complaint and affidavit submitted to you were not returned as they should have been, with your letter. Kindly see that they are sent to us at the earliest moment.

“Yours very truly,

“HARTMAN & THOMPSON,

“General Agents,

“By DOUGLAS R. TATE.”

It appears that after the judgment was rendered in the Washington court a motion for a new trial was filed which was denied. It also appears that a judgment was rendered against the surety company under the statute of the State of Washington at the same time as that against Schley. This was when the company was first made a party to the record. Defendants Sheppard and Martin, who were not parties to the record in the action of *Meach v. Schley*, failing to obtain the assistance of the surety company to bring a suit to set aside the judgment, filed a complaint to restrain

the levy of execution on the judgment, alleging the settlement with Meach. To this Meach interposed a demurrer, which was sustained by the court, and the suit was dismissed.

It is the position of counsel for plaintiff that as to his liability on the indemnity agreement defendant Sheppard had an adequate remedy at law by a motion for a new trial, and that a suit in equity to set aside the judgment as desired by him could not be maintained. The record shows that the defendant Sheppard exhausted all the means at his command to obtain a trial of the issues involved and did not secure such until the trial of the present case. From the manner of the presentation of this case upon appeal, it might be inferred that it was the impression of counsel that the cause would be tried *de novo*. Under Section 159, L. O. L., in an action at law the findings of the trial court on the facts are deemed a verdict. This court has uniformly held that such findings cannot be set aside on appeal if there is any competent evidence to support them: *Astoria R. R. Co. v. Kern*, 44 Or. 538 (76 Pac. 14); *Flegel v. Koss*, 47 Or. 366 (83 Pac. 847); *Courtney v. Bridal Veil Box Factory*, 55 Or. 210 (105 Pac. 896); *Sun Dial Ranch v. May Land Co.*, 61 Or. 205 (119 Pac. 758). The appellate court will examine the evidence in an action tried by the court without a jury only to the extent of determining if there is any competent evidence to support the findings. We cannot review the weight or sufficiency of the evidence: *Seffert v. Northern Pac. Ry. Co.*, 49 Or. 95 (88 Pac. 962, 13 Ann. Cas. 883). In such a case the trial judge acts as a jury. The findings in this cause may be referred to as a verdict.

Robb v. Security Trust Co., 121 Fed. 460 (57 C. C. A. 576), was originally an action by the latter

against the former as an indemnitor for the company having signed a replevin bond in the sum of \$15,000 upon which a verdict and judgment had been rendered against it for the sum of \$14,621.88. Robb, the indemnitor of the surety company on the replevin bond, was notified to defend the action thereon which he did. After an adverse judgment, a writ of error was sued out. The security company refused to execute a supersedeas bond or continue the litigation. The indemnitor sued out the writ of error in the name of the Security Trust Company without a supersedeas to which the company subsequently objected. After paying the judgment appealed from, the Security Trust Company notified the indemnitor that unless other security was given it would move to dismiss the appeal. Thereupon the writ of error was discontinued by the indemnitor. The United States District Court held that the request of the Security Trust Company for indemnity of the amount of the judgment was not unreasonable and instructed a verdict for plaintiff, Security Trust Company. Upon appeal to the United States Circuit Court of Appeals for the Third Circuit, after a full statement of the case, at page 464 of 121 Fed., 57 C. C. A. 576, that court observes:

“We only differ from the learned judge of the court below, in that we think there was testimony in this case tending to show that the security company did do something to impair the right of Mr. Robb to have the judgment against the said security company reviewed in the appellate court by a writ of error, and we think that it should therefore have been submitted to the jury to say whether the testimony so tending was sufficient to establish the fact of an improper and unjustifiable interference by the security company with that right of the plaintiff in error. * * The well-settled interpretation of such undertaking is that the liability

of the indemnitor is not fixed, except by definitive judgment against him on the replevin bond referred to. In any such suit, the indemnitee must, under the contract of indemnity, either in good faith defend himself, or vouch the indemnitor to defend the suit at his (the indemnitor's) own costs and charges, rendering such assistance as he may be called upon by the indemnitor to render in facilitating and furthering such defense. * * That is, the indemnitor is entitled, under such circumstances, to all the rights of defense to such a suit, including the right of review, which belonged to the indemnitee as the real party thereto."

In regard to the demand for further indemnity, the case at bar is similar to that from which we have quoted. The latter case shows that where the question of the good faith of the indemnitor in making a further defense, and the fairness of the indemnitee in permitting and assisting in making such defense, are involved, whether the right of the indemnitor to make a full defense has been impaired by the act of the indemnitee is a proper question for the jury. In the case under consideration, Sheppard, the indemnitor, insisted upon and earnestly endeavored to obtain a full trial in the original case of *Meach v. Schley*. Relying upon the settlement which he had made for Schley, Sheppard was not present at the trial. A motion for a new trial, as its name indicates, is an application for, and not, as a rule, a full trial of a cause. It is not enough to say that Sheppard if he was not satisfied with the decision in that case should have appealed therefrom. What he asked was to have an original trial in the name of the United States Fidelity & Guaranty Company in order to produce evidence and complete the record so that an appeal would properly present the issues. If upon such trial he did not then win, an appeal would be a matter for consideration. Schley,

the other defendant in the case, could not be found. No one questions the conclusion of the Washington court as the record stood in that case. In the present litigation the trial judge acting as a jury found a verdict to the effect that Sheppard's request as an indemnitor to make such defense was reasonable; that the claim in the *Meach v. Schley Case* had been fully settled, and that the judgment rendered therein was fraudulent and not binding upon Sheppard as an indemnitor; that the United States Fidelity & Guaranty Company, the indemnitee, had not afforded Sheppard, its indemnitor, ample opportunity to fully defend in the litigation. There was without question competent evidence tending to support such findings or verdict, and this is as far as we are permitted to inquire. Sheppard contends that as an indemnitor he is not bound by the judgment of the Washington court. It is stated in 1 Freeman on Judgments (4 ed.), Section 181, as follows:

"In order to become thus bound, the covenantor must be tendered 'a full, fair and previous opportunity to meet the controversy,' " and that he should be allowed all the means of defense open to him had he been made a party.

In *Oceanic Steam Nav. Co. v. Campania Transatlantica Espanola*, 144 N. Y. 663 (39 N. E. 360), the rule is stated as follows:

"It is sufficient that the party against whom ultimate liability is claimed is fully and fairly informed of the claim and that the action is pending with full opportunity to defend or to participate in the defense."

In *Eaton v. Lyman*, 26 Wis. 61, the court in considering a case where the defendant was sued to contest his title to land, and where he brought in his grantor to bind him by the judgment, says:

“It should appear, not only that the grantor was notified of the suit and requested to defend it, but that he was allowed to do so to the utmost extent of the law, if he desired to. Otherwise a defendant in ejectment might acquiesce in an erroneous result of a trial, and refuse his grantor an opportunity to correct it by appeal, and still conclude him by the judgment in an action on his covenants. This would be clearly unjust.”

See, also, *City of New York v. Baird*, 176 N. Y. 269 (68 N. E. 364); *Garrison v. Transportation Co.*, 94 Mo. 130 (6 S. W. 701); *City of St. Joseph v. Union Ry. Co.*, 116 Mo. 636 (22 S. W. 794, 38 Am. St. Rep. 626); *Ladd v. Kuhn*, 154 Ind. 313 (56 N. E. 671). We know of no hard-and-fast rule that would prevent a court of equity from entertaining a suit by one against whom a fraudulent judgment had been entered to set aside such judgment. *Marsh v. Perrin*, 10 Or. 364, is authority for such a suit. See, also, *Dist. etc. v. White*, 42 Iowa, 608. Mr. Pomeroy, in 4 Pom. Eq. Juris. (13 ed.), Section 1357, states in effect that, while the inadequacy of legal remedies is professed to be the test and limit of equitable jurisdiction in applying this criterion the modern decisions with some exceptions have certainly held “the legal remedy inadequate in many instances and under many circumstances where Chancellor Kent would probably have refused to interfere.” Under the facts found by the trial court, the judgment in the action of *Meach v. Schley* was *prima facie* evidence only of the liability of Sheppard as indemnitor, and the latter had the right to interpose a defense in the present case: 22 Cyc. 93. The document signed by Meach is more than a receipt. It contains a contractual stipulation to dismiss the Washington case. Under Section 761, L. O. L., as well as under the federal

Constitution, the effect of a judicial record of a sister state is the same here as in the state where it was made. In the absence of any showing to the contrary, the court will assume that the common-law rules in force in this state are in force in a sister state: *De Vall v. De Vall*, 57 Or. 128 (109 Pac. 755, 110 Pac. 705). Therefore the Washington judgment should be given the same force and effect as though it had been rendered in Oregon; no more and no less.

It follows that the judgment of the lower court should be affirmed.

Argued July 7, affirmed July 20, rehearing denied September 14, 1915.

AITKEN v. BJERKVIG.*

(150 Pac. 278.)

Fraud—Pleading—Complaint—Sufficient.

1. The complaint in an action for fraud, inducing plaintiffs to exchange their city residence property for acreage land of defendants, which alleges that plaintiffs were ignorant of farming land and strangers to the real estate and locality where such land was situated, that, on arriving at the land, a defendant represented that a part thereof was fit for cultivation, and that it was not necessary for plaintiffs to inspect the land, but that they could rely on the representation of defendant, and that the representation was false, and that defendant knew of the falsity, and that plaintiffs relied on the representations, states a cause of action.

[As to action to recover for false representations, see note in 18 Am. St. Rep. 55.]

Fraud—Actionable Fraud.

2. Where parties deal at arm's-length and have equal opportunity to ascertain the truth as to the quality of the property involved, and no reliance is placed on the representations made by the vendor, the purchaser must take the consequences of his own neglect, and may not rely on the vendor's representations.

*As to the effect of false representations and the right to rely on them, see notes in 35 L. R. A. 417; 37 L. R. A. 593.

Fraud—Fraudulent Representations—Statement of Facts Recklessly Made.

3. One making a false statement of fact recklessly, without knowledge of its truth or falsity, and with intent to influence a transaction and actually influencing it, is liable for fraud.

Fraud—Fraudulent Representations—Reliance on Representations.

4. A false statement by a vendor of agricultural land as to the quality thereof, made to induce a purchaser ignorant of the quality and values of agricultural land, and actually relied on by him, is actionable, for the purchaser could rely on the representations.

Fraud—Actionable Fraud—Evidence.

5. In an action for fraud in inducing plaintiffs to exchange their city residence property for agricultural land, evidence held to require submission to the jury of the issues.

[As to what is sufficient proof of fraud, see note in 65 Am. Dec. 157.]

Fraud—Fraudulent Representations—Damages.

6. Where defendants fraudulently represented that there were 30 acres of arable land on a tract conveyed to plaintiffs in exchange for their city residence property, while there were only 7 or 8 acres of arable land, and the rest of the land was not capable of being cultivated without great additional expense, the jury could award substantial damages for the fraud.

Appeal and Error—Questions Reviewable—Assignment of Error—Bill of Exceptions.

7. A complaint as to the measure of damages, in an action for fraud, cannot be reviewed on appeal, where it is not assigned as error or presented by the bill of exceptions.

From Multnomah: HENRY E. MCGINN, Judge.

Department 1. Statement by MR. JUSTICE BURNETT.

The plaintiffs, J. A. Aitken and Maggie Aitken, bring this action against John Bjerkvig and Jacob J. Bjerkvig, to recover damages for an alleged fraud said to have been practiced upon them by the defendants in exchange of residence property in Portland, Oregon, for acreage owned by the defendants in Lincoln County, Oregon. After describing the Portland realty and alleging that the defendant John Bjerkvig was acting for himself and the other defendant, the complaint avers, in substance, that the defendants represented the Lincoln County land to consist of 60 acres of open timber and 30 acres of cleared land, which had

theretofore been under cultivation, and that the tract had on it a stream of water valuable for water-power purposes, the stream being wholly within the premises; that the plaintiffs were ignorant of farming land and agricultural processes and strangers to the real estate and the locality where it was situated. The primary pleading then contains this allegation:

“That, upon arriving at what the said defendant John Bjerkvig represented to be the tract in question, he pointed out to the plaintiff a tract of land which he stated was part of the 30 acres above referred to as fit for cultivation. That said tract was covered with a rank growth of ferns and weeds, but otherwise appeared to be clear. That the said defendant so pointed the same out to the plaintiff from near the vehicle which had conveyed the parties to the land. Thereupon the plaintiff proposed to walk into the ferns and weeds and examine the land more closely, but the defendant John Bjerkvig told him it was not necessary for him to do so, saying that the land was all clear and ready for the plow; that plaintiff could take his word for that; that all of the 30 acres was like what the parties saw near where they were standing on the edge of the tract; and that in that locality land which had not been cultivated for some years always grew up to ferns and other weeds in the manner in which said tract appeared to be grown up. That the plaintiff, because of his ignorance of all agricultural matters, and because of his confidence in the honesty and good faith of the defendant, was persuaded by the defendant not to examine said tract otherwise than as aforesaid, and returned with the defendant to Portland, Oregon, and closed the deal; the plaintiffs deeding their dwelling-house, as aforesaid, to said Jacob J. Bjerkvig.”

The plaintiffs charge that closer inspection made by them after the exchange was finally effected revealed that 23 acres of the 30-acre tract represented by the defendants to be clear and fit for cultivation in fact had

never been cultivated or cleared and was covered with dead and down timber, logs, stumps and roots of trees, all of which were concealed by the ferns and weeds to such an extent as to be wholly invisible from the place where the defendant pointed out the land to the plaintiff. The usual allegations that the defendants knew the true conditions of the tract, and that the plaintiffs were ignorant of the same, and relied upon the representations made by the defendants, appear also in the complaint.

After a general demurrer to the pleading had been overruled, defendants filed an answer admitting the exchange of properties, that plaintiffs inspected the Lincoln County land, and that John Bjerkvig acted for Jacob, his son, in making the exchange, but otherwise traversing the complaint and averring new matter not necessary to be here considered. The trial resulted in a judgment for the plaintiffs, from which the defendants appeal.

AFFIRMED. REHEARING DENIED.

For appellants there was a brief over the names of *Mr. C. A. Applegren and Messrs. Seton & Strahan*, with an oral argument by *Mr. Applegren*.

For respondent there was a brief and an oral argument by *Mr. B. G. Skulason*.

MR. JUSTICE BURNETT delivered the opinion of the court.

1. The assignments of error are three in number: (1) The overruling of the demurrer to the complaint; (2) disregarding defendants' objection to the reception of any evidence on the ground that the complaint fails to state facts sufficient to constitute a cause of action; and (3) denying the defendants' motion for a

judgment of nonsuit at the close of the evidence for the plaintiffs on the ground that the testimony offered up to that time failed to prove their cause of action. The substance of their testimony is that they and a man named Bender went in company with John Bjerkvig to look at the land. They arrived there in the night, and the next morning went to view the premises. The defendant pointed out a tract that was grown up with tall ferns and weeds and said:

“No one has been living on this for over two years. ferns grow up mighty quick in this country.”

The plaintiff J. T. Aitken then proposed to go into the ferns and examine the land, when Bjerkvig assured him there was no use going through the ferns; that the plaintiff could rely upon his word. The ferns were very wet at the time, and, taking defendant's statement as true, the plaintiffs made no further examination of the land thus covered with the ferns. It is also in testimony that subsequent examination showed that only about seven acres of the tract had ever been plowed, and that the remainder pointed out by the defendant as land ready for the plow was covered with logs and stumps concealed by the weeds and ferns, and that it was utterly unfitted for plowing, and could not be made arable, except at great expense. In our judgment, the complaint states facts sufficient to constitute a cause of action.

2. The question is, then, whether there was any testimony competent to go to the jury on the issues involved. The defendants contend that because the plaintiffs had an opportunity of examining the land, but did not, they have no right to rely upon the representations made by the defendant. It is true, as a

general rule, that where parties deal at arm's-length, and have equal opportunity to ascertain the truth as to the quality of the property involved, and no reliance is placed upon the representations made by the seller, the buyer must take the consequences of his own neglect.

The rule is thus tersely stated by Mr. Justice FIELD in *Slaughter's Admr. v. Gerson*, 13 Wall. 379, 385 (20 L. Ed. 627):

"Where the means of information are at hand and equally open to both parties, and no concealment is made or attempted, the language of the cases is that the misrepresentation furnishes no ground for a court of equity to refuse to enforce the contract of the parties. The neglect of the purchaser to avail himself, in all such cases, of the means of information, whether attributable to his indolence or credulity, takes from him all just claims for relief."

Van Horn v. O'Connor, 42 Wash. 513 (85 Pac. 260), was a case involving an exchange of land. Mr. Chief Justice MOUNT there said:

"This court has frequently held that, where representations are made as a matter of opinion, there is no liability for misrepresentations, where the parties are dealing at arm's-length, and the means of knowledge are as open to one party as to the other. * * But where the representations made are of material facts within the knowledge of the vendor, and entirely without the knowledge of the vendee, and where the circumstances are such as reasonably call for a reliance thereon, the rule is that the vendee may rely upon the representations of the vendor."

Again, Mr. Justice HADLEY, writing in *Mulholland v. Washington Match Co.*, 35 Wash. 315, 321 (77 Pac. 497, 499), uses this language:

"It is argued that since no fiduciary relation existed, and since it is not alleged that respondent was overcome by cunning or artifice, by reason of being frail of body, or of weak and imbecile mind, caused by advanced age or disease, he does not show a ground for relief. It cannot be the law that a person of ordinary faculties may never rely upon representations made to him, even though no fiduciary relation may exist. Each case must depend upon its own circumstances."

Grider v. Clopton, 27 Ark. 244, noted in defendants' brief, was a case where the purchaser was skilled in land values and made an actual examination of the whole premises unhindered or uninfluenced by the seller.

In the *Slaughter-Gerson Case*, already referred to, the seller made no representations whatever, but invited a full examination of the property, in that instance a steamboat, and the purchaser himself made a full, complete and independent inspection, having the aid of ship carpenters, whom he employed to determine the draft of the vessel.

In *Wimer v. Smith*, 22 Or. 469 (30 Pac. 416), the property involved was a mining claim with an appurtenant water right. The defendant resisted foreclosure of a purchase-money mortgage on the ground that the plaintiff had misrepresented the availability of the water for mining that particular ground. The court denied relief to the defendant because the testimony very clearly showed that he had made a full, complete and independent inspection of the property and water right with the aid of a skilled mining man in his employ and had declared that he bought the property on his own judgment without taking the statement of any person.

In *Jackson v. Armstrong*, 50 Mich. 65 (14 N. W. 702), the question involved was an alleged fraud in the exchange of farms. The testimony offered tended to show that the seller of one of the farms falsely represented to the purchaser, on a view of the land at which both were present, that the low ground could be drained, most of it made tillable, and the rest fitted for pasturage; that the water was then high, because the season had been late; and that the farm was a very valuable one. The trial judge had excluded this evidence on the ground that, as the defendant had a view of the premises, he was bound to rely on the testimony of his own eyes. The appellate court, however, said that the principle had been misapplied, and that the practicability of draining the land was not necessarily apparent on a mere view, and then used this language:

“Bearing in mind the quality of the facts and the character of the inquiry, it was certainly not a question of law whether the truth was discoverable by the defendant by being on the farm, and the trial judge was not at liberty to rule on the subject as though it was. The facts should have gone to the jury under proper instructions as to whether there was fraud or not. The circumstance that the defendant was on the farm would not be sufficient to cut him off from making proof of any fraudulent representations, which his being there would not enable him to impeach.”

We take these references entirely from precedents cited by the defendants in their brief. They all depend upon the principle that both parties had equal means of knowledge and like opportunities to observe, and that no effort had been made to prevent inspection. In our judgment the litigants in the instant case did not have equal opportunities to know the truth.

3-5. The defendants appear to have been familiar with the realty they were offering to sell, or, if not, a statement of fact made by them recklessly without knowledge of its truth or falsity, and with intent to influence the trade, would equally bind them. The plaintiff husband was a carpenter and was ignorant of the quality and values of agricultural land. The statement of the seller of the farm that the buyer could rely upon his word, and that there was no use of his going into wet ferns to examine the land, had a tendency to dissuade him from close inspection. A different case would be presented if in fact the plaintiffs had possessed a general knowledge of such lands, and if the defendants had made no statement calculated to forestall minute inspection. If the defendants spoke at all with a view of influencing the conduct of the plaintiffs, it was their duty to speak the whole truth. The doctrine is aptly stated by Mr. Justice WATERMAN in *Van Velsor v. Seeberger*, 59 Ill. App. 322, 326, in this excerpt:

“Any person has a right to rely upon positive statements or warranties of a vendor as to the quality of an article he offers for sale, where the article is not present, or, if present, its appearance does not contradict the representations. A positive statement of quality, the truth or falsity of which is not apparent, has a tendency to dissuade one from making an inspection. * * A vendor may not willfully make false representations as to material facts about the construction or quality of a house and escape liability therefor by showing that the matters of which he spoke were open to the inspection and scrutiny of the defendant, and that, if he believed the lie, it was his own fault. Such is not, in this generation, either the law or a description of common honesty: *Benjamin on Sales*, 382, 390; *Witherwax v. Riddle*, 121 Ill. 140 [13 N. E. 545].”

As to the weight to be accorded to these representations we make no intimation. That was for the jury. The only question for us to determine, in passing upon the correctness of the decision of the motion for a nonsuit, is whether there was any evidence to go to the jury on the issues involved. We are clear that there were representations made by the defendants, through the one speaking for both, calculated to and which must have influenced the conduct of the plaintiffs, and upon which the latter had a right to rely, and hence enough was shown to carry the case to the jury as against a motion for a nonsuit.

6. The defendants further urge that the true measure of damages is the difference between the market values of the properties exchanged, and that, because no evidence was offered on that question, the plaintiffs failed to prove their case in an essential particular. But referring again to a precedent cited by the defendants, namely, *Van Velsor v. Seeberger*, 59 Ill. App. 322, 326, we find this language:

“It is shown that the representations as set out in the letter were made, and that they were made to influence plaintiff to purchase the house; that he relied upon them; that some of those that were material were untrue. It is plain that there is some damage. The house is not as good as it would be if the representations were true. How much the damage is is not shown, but, under the circumstances, at least nominal damages should have been assessed”; citing authorities.

So in this case, there being evidence tending to show that the plaintiffs were influenced by the untrue statements of the defendants to take the land in question, and that, instead of there being 30 acres of arable land on the premises, there were only 7 or 8, there would

be enough testimony to go to the jury on the question of damages. If, in fact, the land was not capable of being cultivated without great additional expense, it is a matter within the common sense of the average juror that it would not be as valuable as land already subject to the plow. Evidence of the market values of the properties exchanged would be only cumulative upon that already given about the actual state of the premises. The errors assigned, as before stated, depend upon whether the facts alleged are sufficient to constitute a cause of action, and whether there was any evidence proper to be submitted to the jury on the issues presented. Both these questions must be decided against the defendants.

7. Some complaint was made in the argument about the measure of damages, but it is not assigned as error; neither is the question presented by the bill of exceptions. Hence we cannot attend to the discussion of that point.

So far as the record shows, the case was properly submitted to the jury for its decision, and the judgment must be affirmed.

AFFIRMED. REHEARING DENIED.

MR. CHIEF JUSTICE MOORE, MR. JUSTICE BENSON and MR. JUSTICE HARRIS concur.

Argued July 1, reversed July 27, rehearing denied September 14, 1915.

MARTIN v. FLETCHER.

(149 Pac. 895.)

Landlord and Tenant—Action for Rent—Reasonable Rent.

1. A complaint in an action for rent, which alleges that plaintiff leased to defendant for a season a 63-acre tract, that defendant agreed to farm the tract and pay as rental \$4 per acre for 45 acres of tillable land and the customary rental for 11.5 acres of hops, and that the customary rental of hop-yards was half of the proceeds of the sale of the hops after a specified deduction for the cost of raising and baling, and which sets forth the amount of hops produced, states a cause of action for the reasonable rent of the hop tract, and not for the amount of rent shown to be due by custom, and a charge authorizing a recovery only on proof of a custom as to rentals was erroneous.

Landlord and Tenant—Action for Rent—Estoppel.

2. Where a widow leased land assigned to her as dower, though subsequently the assignment was declared illegal, the tenant was estopped to deny that the widow had title to the premises or the right to rent the same; the tenant not being ousted from the premises nor compelled to pay rent to any other person.

Landlord and Tenant—Action for Rent—Complaint—Evidence— "Usual"—"Customary"—"Reasonable."

3. A complaint, in an action for rent, which alleges that plaintiff let to defendant a specified tract and that defendant agreed to pay as rental \$4 per acre for a part of the land and the customary rental for a hop tract, justifies evidence of the reasonable rental value of the hop tract, as against the objection that plaintiff sought a recovery for rental as fixed by custom; there being a close relation between the words "customary," "usual," and "reasonable."

Appeal and Error—Questions Reviewable—Disposition of Case on Appeal—Constitutional Provisions.

4. The Supreme Court, on appeal from a judgment for defendant in an action for rent, must, under Article VII, Section 3, of the Constitution, as amended in 1910 (see Laws 1911, p. 7), find the reasonable rental value of the land from all the evidence in the record, where the complaint seeks a recovery for the reasonable rental value.

Landlord and Tenant—Title of Landlord—Right of Tenant to Question.

5. One who holds as tenant of another, by treating with her and trying to settle with her attorney in fact when the time came to make a settlement, is, under Section 798, subd. 5, L. O. L., precluded from questioning the landlord's title.

[Estoppel of tenant to deny landlord's title, see notes in 15 Am. Dec. 40; 89 Am. St. Rep. 62.]

Dower—Action for Rent—Liability of Tenant.

6. Section 7297, L. O. L., entitles a widow to dower in lands of which her husband died seised, and authorizes her to continue to occupy the lands or receive half of the rents so long as the heirs or others interested do not object, without having dower assigned. Dower was assigned to a widow, who leased the property assigned to a tenant. Subsequently the assignment was set aside, and new commissioners were appointed to make a new admeasurement, which was confirmed nearly a year later. No one objected to the widow's receiving the rent of the land first assigned to her, but all acquiesced therein. The executor testified that the estate did not claim or collect any of the rent. *Held*, that the widow was entitled to collect the rent.

From Yamhill: WEBSTER HOLMES, Judge.

Department 2. Statement by MR. JUSTICE BEAN.

This is an action by Catherine E. Martin against Henry Lee Fletcher. Plaintiff alleges, in substance, that about April 1, 1913, she leased to defendant for the season of 1913 a 63-acre tract of land, known as the "Fletcher farm," situate about two miles from McMinnville, Yamhill County, Oregon, which he agreed to farm and to pay the following rental, to wit, \$4 per acre for 45 acres of tillable land, and the "customary rental" for 11.5 acres of hops growing on the place; that the customary rental for hop-yards in that vicinity was one half of the proceeds of the sale of the hops after deducting seven cents per pound for the expense of raising and baling them; that defendant harvested and baled 11,000 pounds of hops on the tract which were sold for 21 cents per pound, claiming \$895 as the amount due.

Defendant denies the leasing of the premises from plaintiff, and asserts that they were a part of the estate of John S. Martin, deceased, "which estate is in process of administration in Polk County, Oregon; that appellant's dower in said 'Fletcher farm' was not assigned until after this suit was filed and the crop season of 1913 was past; that respondent had held the

premises from year to year under his grandfather, the said John S. Martin, and since his death under the executors of his grandfather's estate; and that his holding during the term mentioned in the complaint was under the executors, to whom alone he was accountable for the rent."

In the reply appellant set up an estoppel based upon the alleged contract and relation of landlord and tenant between appellant and respondent. The record shows that on February 3, 1913, the County Court of Polk County, Oregon, assigned a certain 63-acre tract out of the "Fletcher farm" to plaintiff as dower; that thereafter on May 31, 1913, after objections, this first assignment of dower was declared illegal and was set aside by the same court, and new commissioners appointed to make a new admeasurement, which second admeasurement was confirmed and the dower finally legally assigned on January 22, 1914. Upon the trial before the court and jury, plaintiff introduced evidence tending to support the allegations of the complaint. The testimony of defendant tended to show that there was no fixed "customary rental" for hop-yards in that vicinity; that they were rented upon different terms, some for the rental as claimed by plaintiff, and others for a one-fifth, a one-fourth, and a one-third share of the crop.

REVERSED. JUDGMENT ENTERED.

REHEARING DENIED.

For appellant there was a brief over the name of *Messrs. McCain, Vinton & Burdett*, with oral arguments by *Mr. James McCain* and *Mr. James E. Burdett*.

For respondent there was a brief over the name of *Messrs. Lange, Hewitt & Nott*, with oral arguments by *Mr. L. E. Lange* and *Mr. Earl Nott*.

MR. JUSTICE BEAN delivered the opinion of the court.

Eleven errors are assigned, but we deem it necessary to consider only the principal ones.

1. The trial court construed the complaint as pleading a custom as a basis for plaintiff's cause of action, and refused to allow the evidence to be considered as showing a reasonable rental or any other rent or amount different from that claimed in the complaint. The court instructed the jury, among other things, to the effect that the plaintiff relied upon an express contract, stating its terms, and further that, before the jury could find for the plaintiffs, they must find by the greater weight of the evidence that the terms named were what were agreed upon between the parties; and also that plaintiff was bound to prove a custom, as to rental, in the vicinity which was "uniform and general in that community, and cannot by a few isolated cases, such as the plaintiff claims here, but it must have been general and uniform, and the plaintiff is bound to establish that to your satisfaction by the greater weight of the evidence, and, unless she has done so, your verdict would have to be for the defendant. And you will not confuse your minds with any question of equity or fair dealing between these parties, with reference to the rent." This instruction practically took the case from the jury. The purport of the charge to which an exception was saved was that, before plaintiff could recover, the jury must find that the parties agreed upon the amount or share of rent. As we understand the case, there was an agreement of leasing the land, but the question of the customary rental for hop land was not settled. The fact that plaintiff claimed more

than a reasonable value would not debar her from recovering a fair amount.

2. Plaintiff requested, and the court refused to instruct the jury, in effect, that:

“If you find that the defendant entered into an agreement with the plaintiff whereby the defendant rented from the plaintiff the real premises described in the complaint, and held, used and occupied said real premises under such contract, during the said season of 1913, and was not ousted from said premises or compelled to pay rent to any other person for the use thereof, then the defendant is estopped from denying that the plaintiff had title to said premises, or the right to rent the same to him for the said crop season of 1913, and you will find in favor of the plaintiff.”

We think the plaintiff was entitled to the substance of the requested charge.

3. The court rejected proof upon the cross-examination of defendant's witnesses tending to show a reasonable rental value of the land, stating that the only matter at issue was the customary rental. Plaintiff's counsel duly objected and saved an exception to all the rulings. We think the language of the complaint led the court to give an erroneous construction thereof, and prevented the real question from being submitted to the jury. While we believe it is better for the pleader to follow the beaten path and not search for synonyms, we understand the complaint was intended to state that the contract of leasing was to be for a reasonable rent. The evidence of plaintiff was in much the same language. Search the dictionary and text-books, and we find there is a close relation between the words “customary,” “usual,” and “reasonable” (see 26 Cyc. 819), as to the market value or

that fixed in the "usual" and ordinary course of trade: See, also, 5 Words and Phrases, p. 4383.

By his evidence the defendant practically admits that it was agreed that he should pay plaintiff \$4 per acre for the tillable land not in hops. This part of the case seems to have been overlooked, and plaintiff recovered nothing. The jury should have been instructed, in case they found there was a leasing by plaintiff to defendant, to ascertain the customary or reasonable rental value of the land. The judgment will therefore be reversed.

4. We are governed by Section 3, Article VII, of the Constitution, as amended in 1910 (see Laws 1911, p. 7), which directs:

"Until otherwise provided by law, upon appeal of any case to the Supreme Court, either party may have attached to the bill of exceptions the whole testimony, the instructions of the court to the jury, and any other matter material to the decision of the appeal. If the Supreme Court shall be of opinion, after consideration of all the matters thus submitted, that the judgment of the court appealed from was such as should have been rendered in the case, such judgment shall be affirmed, notwithstanding any error committed during the trial; or if, in any respect, the judgment appealed from should be changed, and the Supreme Court shall be of opinion that it can determine what judgment should have been entered in the court below, it shall direct such judgment to be entered in the same manner and with like effect as decrees are now entered in equity cases on appeal to the Supreme Court."

This court should find the reasonable rental value of the land from all the evidence which is contained in the record.

5. Defendant recognized that he was holding as tenant of plaintiff by treating with her, and, when the

time came to make settlement, tried to settle with her attorney in fact, and is precluded from questioning her title: *Jones v. Dove*, 7 Or. 467, 472; Section 798, subd. 5, L. O. L.

6. Section 7297, L. O. L., entitles the widow to dower in the lands of which her husband died seised, and she may continue to occupy the same with the children or other heirs of the deceased, or may receive one half of the rents, issues and profits thereof so long as the heirs or others interested do not object, without having the dower assigned. Hence it was immaterial that the first assignment of dower was set aside, a change made, and the admeasurement not complete until afterward. No one appears to have objected to the widow receiving the rents, but all seem to have acquiesced therein. The executor of the will testified that the estate did not claim or collect any of the rent of plaintiff's dower land for the year 1913. From the evidence it appears that a survey showed there were 43.7 acres of tillable land besides the hop-yard, which at \$4 per acre amounts to \$174.80. There were raised on the land 7,344 pounds of hops which were sold at 21 cents per pound, making \$1,542.24. Defendant and his witnesses state that the center of the tract of hops was poor and a little wet; that, while it was good land, it was not so good hop land; that the remainder was fairly good. This evidence seems reasonable and fair. The evidence of Mr. A. M. Peery, plaintiff's agent, was to the effect that it was agreed that defendant would pay the customary rental, which he told defendant he understood to be the seven-cent proposition stated above. His evidence does not go to the point that defendant agreed to this, so the initiatory pleading and the proof leaves the reasonable value to be determined.

Taking all the evidence, we believe that one-fourth part of the amount for which the crop of hops was sold, or \$385.58, would be a fair rental for the hop tract. The fact that defendant had rented the land of his grandfather for less would not control. Neither would the good price of hops for that year govern in the matter. We do not fix the highest or the lowest figures. Neither is the field of hops the best nor the poorest.

The above sum added to \$174.80 makes a total of \$560.38, the amount for which judgment should be entered in favor of plaintiff, which is directed to be so entered.

REVERSED.

JUDGMENT ENTERED. REHEARING DENIED.

MR. CHIEF JUSTICE MOORE, MR. JUSTICE EAKIN and
MR. JUSTICE HARRIS CONCUR.

Argued September 7, reversed September 14, 1915.

STATE v. NICHOLLS.

(151 Pac. 473.)

Indictment and Information—Complaint—Demurrer.

1. As a statute not in conformity with the Constitution must be disregarded, a demurrer to a criminal complaint charging a violation of a statute raises the question whether the statute itself is valid.

Constitutional Law—Sunday—Due Process—Police Power.

2. Under the police power, whereby the state may provide for the public health, peace, welfare and safety, the legislature may prohibit the carrying on of particular occupations on Sunday, without violating Const. U. S. Amend. 14, prohibiting the deprivation of life, liberty or property without due process of law.

Constitutional Law—Equal Protection of Law—Class Legislation.

3. Section 2125, L. O. L., prohibiting any person from keeping open any store, shop, grocery, bowling alley, billiard-room or tippling-house for the purpose of labor or traffic, or any place of amusement

on Sunday, but exempting theaters, drug-stores, doctor-ships, undertakers, butchers, bakers and livery-stable keepers is not void under Article I, Section 20, of the Constitution, declaring that no law shall be passed, granting any citizen privileges or immunities, which shall not equally belong to all citizens, and Const. U. S. Amend. 14, declaring that no state shall deny to any person equal protection of the law; the classification of occupations being a reasonable one.

[As to constitutionality of Sunday laws, see note in 79 *Am. Rep.* 264.]

From Lane: ROBERT G. MORROW, Judge.

Department 1. Statement by MR. JUSTICE BURNETT.

Leigh E. Nicholls was convicted of violating the Sunday law in Justice's Court, and he appealed to the Circuit Court, where a demurrer to the complaint was sustained.

This case is founded upon a complaint which charges:

"That the above-named Leigh E. Nicholls defendant, on the 18th day of October, A. D. 1914, in the county of Lane, State of Oregon, then and there being, did then and there wrongfully and unlawfully keep open for traffic a store then and there known as the Club Cigar Store, by then and there selling and disposing of, for money, cigars, tobacco, and candy to one D. A. Elkins; said 18th day of October, 1914, then and there being the first day of the week, commonly called Sunday, or the Lord's Day, and said Club Cigar Store then and there not being exempt from the provisions of Section 2125 of Lord's Oregon Laws—contrary to the statutes in such case made and provided and against the peace and dignity of the State of Oregon."

Despite his motion to dismiss and his demurrer to the complaint, the defendant was convicted in the Justice's Court, where the cause originated, and appealed to the Circuit Court. The demurrer to the complaint was sustained by the latter tribunal, and the state appeals.

REVERSED.

For the State there was a brief over the names of *Mr. Joseph M. Devers*, District Attorney, and *Mr. J. F. Brumbaugh*, with an oral argument by *Mr. Devers*.

For respondent there was a brief over the name of *Messrs. Foster & Hamilton*, with an oral argument by *Mr. R. S. Hamilton*.

MR. JUSTICE BURNETT delivered the opinion of the court.

1. The prosecution urges that the question which the defendant makes about the constitutionality of the act is not raised by the demurrer. With this contention we cannot agree. To sustain a conviction, the allegations accusing one of crime must impute to the defendant some act in contravention of a public law forbidding the same, and although there may be an enactment of the legislative power which upon its face prohibits the transaction in question, yet if the statute does not conform to the Constitution the former must be disregarded, leaving the criminal accusation without substantial foundation. Hence it is that a demurrer to a criminal complaint will bring before the court for consideration whether or not the acts charged, although within a legislative enactment defining a crime, are yet insufficient for the reason that the legislation itself is void.

2, 3. The complaint is framed to meet the terms of Section 2125, L. O. L., reading thus:

“If any person shall keep open any store, shop, grocery, bowling-alley, billiard-room, or tippling-house, for the purpose of labor or traffic, or any place of amusement, on the first day of the week, commonly called ‘Sunday’ or the ‘Lord’s Day,’ such person upon conviction thereof, shall be punished by a fine not less

than \$5.00 nor more than \$50: Provided, however, that the above provisions shall not apply to theaters, the keepers of drug-stores, doctor-shops, undertakers, livery-stable keepers, butchers, and bakers; and all circumstances of necessity and mercy may be pleaded in defense, which shall be treated as questions of fact for the jury to determine when the offense is tried by jury."

The defendant maintains under his demurrer that this legislation is violative of Section 20 of Article I of the state Constitution, which declares that:

"No law shall be passed granting to any citizen or class of citizens, privileges or immunities which, upon the same terms, shall not equally belong to all citizens."

He also contends that it is not in harmony with Section 1 of Article XIV of the national Constitution, which says:

"No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

It is by virtue of that potent and flexible authority known as the police power that the legislative branch of the state government assumes to control citizens in the transaction of their daily affairs. It finds its sanction in the right of the state to provide for the public health, peace, welfare and safety. The only restriction which affects the question is that the legislation must have some reasonable relation to those elements of public concern and must be uniform in its operation upon all persons similarly situated. The principle rendering it lawful to forbid the pursuit of

an occupation on Sunday is settled in this state by the case of *Ex parte Northrup*, 41 Or. 489 (69 Pac. 445), where this court sustained the statute making it a misdemeanor to carry on the business of barbering on that day. The underlying reason for the rule is the propriety of providing a day of rest and relaxation for those who are engaged in certain employments.

Granted the postulate that it is within the scope of the police power to suspend activity in certain vocations on Sunday, it remains to consider whether the classification set out in the statute under consideration is a reasonable one. The defendant's attack upon the statute is based upon the proviso exempting theaters, the keepers of drug-stores, doctor-shops, undertakers, livery-stable keepers, butchers and bakers. The essence of his contention is that this amounts to an unreasonable discrimination, so that the law does not affect alike all persons similarly situated. Bearing in mind that we must respect the determinations of the legislative branch of the government, and uphold them as harmonious with the Constitution, if possible, it is our duty to so construe this statute that it may be efficacious, unless it is plainly hostile to the fundamental law.

The general rule laid down by the enactment forbids keeping open any store, shop, grocery, bowling-alley, billiard-room or tippling-house for the purpose of labor or traffic. An exception is found in the proviso excluding the occupations already named. A good reason for this may be found in the fact that drug-stores, doctor-shops, undertakers, butchers, bakers, and livery-stable keepers minister to wants that are more imperative as a rule than those supplied by the general run of business in the occupations named, while theaters afford mental diversion conducive to rest and

relaxation. The emergency involved gives color and sanction to the exception. The law applies to all persons coming within the class described and limited in the statute. Many situations are pointed out in the argument of the defendant illustrating possible absurdities. For instance, a carpenter-shop may be closed, but the carpenters themselves might be working on the outside, or the store of the defendant, where cigars and candy are sold, might be closed, yet the same articles might be purchased in a drug-store. These contentions are properly addressed to the legislative branch of the government. We are concerned only with the authority, and not with the wisdom, of the lawmakers. The question of whether an institution which vends both drugs and candy is a drug-store or a candy-shop is not before us. We are convinced that the classification set out in the statute is reasonable, and that the legislation is a proper exercise of the police power.

The Circuit Court erred in sustaining the demurrer, on account of which its judgment is reversed and the cause remanded for further proceedings.

REVERSED AND REMANDED.

MR. CHIEF JUSTICE MOORE, MR. JUSTICE MCBRIDE and MR. JUSTICE BENSON concur.

Appeal dismissed without an opinion December 22, 1914.

Motion to reinstate appeal denied June 20, 1915.

Motion to retax costs denied September 21, 1915.

GROSS v. GAGE, SHERIFF.

(149 Pac. 939; 151 Pac. 655.)

Appeal and Error—Perfecting of Appeal—Serving and Filing of Undertaking.

1. An appeal is perfected five days after the filing and serving of the undertaking on appeal, where appellant does not, as authorized by Section 550, L. O. L., as amended by Laws of 1913, page 617, except within five days to the sureties.

Appeal and Error—Filing of Transcript—Extension of Time.

2. Under Section 554, L. O. L., as amended by Laws of 1913, page 618, providing for the filing of the transcript within 30 days after perfecting the appeal unless time for the extension of the filing has been granted within the time allowed to file transcript, or the appeal shall be deemed abandoned, the filing of the transcript within the specified time is jurisdictional, and an extension of time is ineffectual when not made within the time allowed to file transcripts.

Costs—Appeal and Error—Briefs.

3. Where the dismissal of an appeal was adhered to on hearing, where both the motion to reinstate the appeal and the merits were presented, respondent is not entitled to costs for expense in printing a brief on the merits, for by contesting the motion to reinstate the appeal he precluded consideration of the matter on the merits.

From Coos: JOHN S. COKE, Judge.

Department 1. Statement by MR. JUSTICE HARRIS.

The defendant, W. W. Gage, as sheriff of Coos County, Oregon, attempted to appeal from a judgment for the plaintiff.

On December 22, 1914, this court dismissed the appeal for the reason that the transcript had not been filed within the time required by law. A motion to reinstate the appeal was submitted and argued in connection with a hearing of the cause on the merits. The judgment was obtained on May 28, 1914. The undertaking on appeal was served and filed June 29, 1914,

and on the same day the Circuit Court made an order granting until July 20th for filing the bill of exceptions. No exceptions were taken to the sureties on the undertaking. On July 17th an order was made extending the time for filing the bill of exceptions and transcript to and including August 5th. On August 4th the time for settling the bill of exceptions was extended to August 20th. The time to file the transcript on August 20th was again extended to September 10th, and finally, on September 9th, the time to file the transcript was extended to and including September 19th. The transcript and bill of exceptions were filed with the clerk of this court on September 19, 1914.

MOTION TO REINSTATE APPEAL DENIED.

Mr. C. R. Wade, for the motion.

Mr. G. T. Treadgold, *contra*.

MR. JUSTICE HARRIS delivered the opinion of the court.

1. The adverse party waives his right to except to the sureties in the undertaking unless he excepts within five days after the service of the undertaking; and upon the expiration of the time allowed to except to the sureties in the undertaking the appeal shall be deemed perfected: Section 550, L. O. L., as amended by Chapter 319 of the Laws of 1913. The appeal was perfected five days after June 29, 1914.

2. Within thirty days after the appeal is perfected the appellant must file the transcript with the clerk of this court; "but the trial court or the judge thereof, or the Supreme Court or a justice thereof, may, upon such terms as may be just, by order enlarge the time for filing the same; but such order shall be made within

the time allowed to file transcript"; and "if the transcript or abstract is not filed with the clerk of the appellate court within the time provided, the appeal shall be deemed abandoned, and the effect thereof terminated": Section 554, L. O. L., as amended by Chapter 320 of the Laws of 1913.

The bill of exceptions was mentioned in the orders of June 29th, July 17th, and August 4th, but was not included in the order of September 9th. The transcript was included in the orders dated July 17th, August 20th, and September 9th, but was not included in the order of August 4th. The 30-day period allowed for filing the transcript after the appeal became perfected expired prior to August 20th. No order of the court was made extending the time for filing the transcript to August 20th, and consequently the order of August 20th was ineffective because not "made within the time allowed to file transcript." The filing of the transcript is jurisdictional, and by the express mandate of the statute the appeal shall be deemed abandoned unless the transcript is filed within the time provided. This court has no authority to exercise any discretion, but the statute fixes an iron-clad rule which must be observed in order to give this court jurisdiction: *Schmidt v. Beatie*, 67 Or. 248 (135 Pac. 875).

The motion to reinstate the appeal is denied, and the order of dismissal is adhered to.

MOTION TO REINSTATE APPEAL DENIED.

ORDER OF DISMISSAL ADHERED TO.

MR. CHIEF JUSTICE MOORE, MR. JUSTICE MCBRIDE and
MR. JUSTICE BURNETT concur.

Denied September 21, 1915.

MOTION TO RETAX COSTS.

(151 Pac. 655.)

Department 1. Statement by MR. JUSTICE HARRIS.

This is a motion to retax costs.

An order dismissing the appeal was made on December 22, 1914, and on June 29, 1915, a motion to reinstate the appeal was denied: *Gross v. Gage, ante*, p. 421 (149 Pac. 939). For the purpose of accommodating the attorneys who appeared for the litigants, and for the sake of expediency, the motion to reinstate the appeal and the merits of the cause were presented at the same hearing. Briefs discussing the merits of the issues arising from the pleadings were filed by the parties.

After the final order made June 29, 1915, the respondent filed his cost bill, and now complains because the clerk of this court disallowed an item of \$47 claimed as the expense of printing the brief filed by plaintiff.

MOTION DENIED.

Mr. G. T. Treadgold, for the motion.

Mr. C. R. Wade, contra.

MR. JUSTICE HARRIS delivered the opinion of the court.

3. This court was without jurisdiction to hear the appeal because the transcript was not filed within the time commanded by statute. The printed brief mentioned in the cost bill related only to the merits of the litigation, and did not refer to the motion to reinstate the appeal. It was necessary to dispose of the motion to reinstate the appeal before the cause could be con-

sidered on the merits; but, because of the fact that it would be convenient for the attorneys and would accommodate all the interested parties, both the motion and the merits of the litigation were heard at the same time. By contesting the motion to reinstate the appeal, the respondent in effect objected to a consideration of the merits of the cause; and now he demands to be paid for a printed brief which he successfully contended the court had no right to consider, and which the court in fact did not examine because of a want of jurisdiction. In *Oregon Elec. Ry. Co. v. Terwilliger L. Co.*, 51 Or. 107, 115, (93 Pac. 930), Mr. Justice MOORE, speaking for the court, says:

“No party respondent should be permitted to recover any item of disbursement incurred after the trial of the cause in the lower court, when his motion to dismiss an appeal for want of jurisdiction is sustained.”

The respondent was not legally entitled to any part of the amount claimed, and for that reason the clerk properly disallowed the item, even though no objection was made by the appellant: *Sommer v. Compton*, 53 Or. 341 (100 Pac. 289).

The motion to retax the costs is denied.

MOTION DENIED.

MR. CHIEF JUSTICE MOORE, MR. JUSTICE McBRIDE and
MR. JUSTICE BURNETT concur.

Argued July 8, affirmed July 30, rehearing denied September 21, 1915.

HOTEL MARION CO. v. WATERS.*

(150 Pac. 865.)

Appeal and Error—Verdict—Special Findings—Evidence.

1. A general verdict in harmony with special findings is conclusive on appeal, where there was some evidence in support of each finding.

Landlord and Tenant—Action for Rent—Evidence—Receipts.

2. Where, in an action for rent, plaintiff denied having accepted or recognized as a tenant a person to whom defendant sublet the premises, and introduced evidence to explain receipts given by it to the subtenant, such receipts, on being offered by defendant, were properly admitted in evidence.

[As to acceptance of rent as waiver of breach of covenant against assignment or subletting, see note in *Ann. Cas.* 1913A, 1202.]

Evidence—Parol—Assignment of Lease.

3. In an action for rent, parol evidence of an assignment of the lease to a third person was admissible to show the relation and understanding of the parties.

Landlord and Tenant—Action for Rent—Surrender of Lease—Instruction.

4. Where, in an action for rent, defendant contended that there had been a surrender of the lease by operation of law, a requested instruction implying that to constitute a surrender there must be an express agreement of the parties was properly refused.

Landlord and Tenant—Eviction—Intent.

5. Where the action of a landlord constituted an interference with the tenant's enjoyment of the premises, the intent with which the landlord acted was immaterial to the question whether such interference constituted an eviction.

Landlord and Tenant—"Eviction"—Act of Permanent Character.

6. To constitute "eviction" of a tenant by act of the landlord, the act need not be of a permanent character, but it is sufficient that it deprive the tenant of the free enjoyment of the premises or some part thereof or appurtenances thereto.

Landlord and Tenant—Eviction—Question for Jury.

7. In an action for rent, the question whether acts complained of by defendant must have persisted at the moment of actual abandonment in order to constitute an eviction was for the jury.

[As to what may amount to eviction, see note in 17 *Am. Rep.* 62.

*As to effect of partial eviction upon liability for rent, see notes in 17 *L. E. A.* 275; 41 *L. E. A.* (N. S.) 430. REPORTER.

Appeal and Error—Harmless Error—Refusal of Instruction.

8. In an action for rent, the erroneous refusal of an instruction, that a notice given by defendant could not be construed as a notice to terminate the tenancy unless defendant was the tenant at the time it was given, was harmless, where it appeared that the question of such notice was immaterial and not considered by the jury, and that no material injury resulted.

From Marion: PERCY R. KELLY, Judge.

Department 1. Statement by MR. JUSTICE BENSON.

This is an action by the Hotel Marion Company, a corporation, against George E. Waters, to recover rent pursuant to the terms of a written lease. The allegations of the complaint are that on the 18th day of July, 1912, plaintiff leased to defendant a room in the Hotel Marion, being the first floor and basement south of the room occupied by plaintiff as a bar, for a term beginning January 1, 1912, and ending January 1, 1915; that plaintiff put defendant into possession of the premises and has ever since maintained the same in a suitable condition for the occupancy of defendant and has duly performed all covenants by it to be performed. Then follow the usual allegations of default in payment of rent and a prayer for judgment. The answer, so far as it is of interest in this discussion, consists of a plea in estoppel alleging that the demised premises had been especially constructed and equipped for use as a billiard-hall and poolroom, and that, in order to increase the patronage and volume of business therein, it was stipulated in the lease that an archway should be opened between the billiard-hall and the barroom; that such archway was opened as a convenient means of access from the hotel and barroom thereto; that on March 7, 1913, defendant assigned the lease to Walter L. Tooze, who immediately went into possession and retained the same until about February 1, 1914; that

plaintiff accepted said Tooze as a tenant who paid the rent to plaintiff as reserved in the lease and the latter accepted the rent so paid; that on November 29, 1913, plaintiff closed and walled up the archway, thereby depriving Tooze and his patrons of a convenient means of ingress and egress and depriving Tooze of the business derived from the guests of the hotel; that on or about February 1, 1914, Tooze gave up possession of the demised premises to plaintiff, who accepted the same, entered into possession, has since leased the property to other parties, receiving compensation therefor, and is now occupying the same. The reply is a general denial. A trial was had resulting in a verdict and judgment for defendant, and plaintiff appeals. **AFFIRMED. REHEARING DENIED.**

For appellant there was a brief and an oral argument by *Mr. Walter C. Winslow*.

For respondent there was a brief with oral arguments by *Mr. John A. Carson* and *Mr. Thomas Brown*.

MR. JUSTICE BENSON delivered the opinion of the court.

It will be seen at once that the questions involved are reducible to two: (1) Was there a surrender of the leasehold by the transfer of possession by defendant to Tooze, and an acceptance of the latter as a tenant by plaintiff? And (2) was there a constructive eviction of Tooze by the act of plaintiff in boarding up the archway? These questions were submitted to the jury and were both answered in the affirmative. The following questions were submitted to the jury for special findings at the request of the plaintiff and were answered as follows:

"Did the defendant assign the lease in question to Walter L. Tooze? Answer yes or no.

"Yes.

"Did the said Walter L. Tooze accept said assignment and take possession under the same? Answer yes or no.

"Yes.

"Did plaintiff herein know of this condition and assignment? Answer yes or no.

"Yes.

"Did the plaintiff knowingly accept the said Walter L. Tooze in place of the defendant herein as a tenant under and by virtue of the terms of the lease in question? Answer yes or no.

"Yes."

1. The general verdict was in harmony with these findings, and is therefore conclusive unless there is a total absence of evidence to support some material fact therein, or some necessary fact is sought to be established by incompetent evidence, or unless the matter was submitted to the jury under erroneous instructions. As to the first, it is enough to say that the record discloses some evidence in support of each of these findings.

2. Counsel for plaintiff contends that the court erred in admitting certain receipts for rent, all of which were alike except as to dates, one of which reads as follows:

"Hotel Marion Co., J. E. Crowe, Manager, Salem, Oregon, 7-26-1913. M— W. L. Tooze, Rent Poolroom, Aug. 13, \$60.00. Paid. Hotel Marion Co., E. S. Springer."

This contention is not tenable in the face of the fact that plaintiff was insisting that it had never accepted or recognized Tooze as a tenant, and, while evidence was introduced by the former for the purpose of explaining the object and effect of these receipts, they

were certainly competent evidence to be weighed by the jury.

3. The next assignment is to the effect that error was committed in permitting the defendant to introduce parol evidence of the assignment of the lease to Tooze. It is true that such evidence would not be admissible for the purpose of establishing the terms of the lease or for the enforcement of a covenant therein contained; but, when a party has gone into possession under an oral assignment, parol evidence thereof is admissible for the purpose of showing the relation and understanding of the parties: *Leadbetter v. Pewtherer*, 61 Or. 168 (121 Pac. 799, Ann. Cas. 1914B, 464); *Crommelin v. Thiess*, 31 Ala. 412 (70 Am. Dec. 499).

4. The next assignment is based upon the refusal of the court to give the following instruction requested by the plaintiff:

“The lease in question between the parties herein is admitted and there is no issue upon that matter. It is further admitted that defendant has not paid his rent under the terms of said lease for the months of February, March, and April for the year 1914, and upon that matter there is no issue herein. The only issues which we are called upon to consider are those raised by the defendant’s answer, and upon those issues defendant has the burden of proving the allegations of his answer by a preponderance of the testimony.

“The defendant claims in his answer that plaintiff cannot recover for the rent which he admits is not paid for the reason that one Tooze mentioned herein was his sublessee and surrendered the premises to the plaintiff herein and that plaintiff accepted the premises and has used them since that time. In order to constitute a surrender, I instruct you that it is the law of this case that the plaintiff herein received and accepted the premises and that there must have been

some agreement whereby it was understood that this lease should be terminated. This agreement need not be in these exact words; but if Tooze surrendered the possession of the premises to plaintiff, and if plaintiff occupied those premises and took possession with the understanding that by doing so the lease herein was being terminated, that is sufficient, but nothing short of such an understanding is sufficient."

This instruction would be good if it did not imply that there must be an express agreement of the parties to a surrender. We do not, however, so understand the law. The defendant never contended that there was an express agreement, but that there was a surrender by operation of law. McAdam on Landlord and Tenant, Volume 2, page 1347, says:

"A surrender in law is where the parties, without any express surrender, do an act so inconsistent with the subsisting relation of landlord and tenant, as to imply an intention that the lessor should be in the same situation as if an express surrender had been made. A surrender of a lease by operation of law may arise from any condition of facts voluntarily assumed by the parties and incompatible with the continued existence of the relation of landlord and tenant between them."

In the case of *Stimmel v. Waters*, 65 Ky. (2 Bush) 285, the court says:

"It is certainly true, as a proposition of law, that if appellee accepted Mrs. Bryant as his immediate tenant or lessee while she was in possession, and recognized her as his tenant, he thereby discharged Stimmel, his original lessee, and he could not properly be made responsible for rent which might accrue after such acceptance."

In the case of *Bowen v. Haskell*, 53 Minn. 480, at page 482 (55 N. W. 629), the same doctrine is expressed thus:

“Again, when the original lessors consented to a sale and transfer of all rights and interest which Haskell has acquired under the lease—and assignment of it, practically—to Chambers, and accepted the latter as their tenant in lieu of Haskell, the relations which had theretofore existed between the latter and his landlords terminated. There was a surrender of the lease held by Haskell, by operation of law, arising from a condition of facts voluntarily assumed, incompatible with the existence of the relation of landlord and tenant between the parties.”

We therefore conclude that the instruction was properly refused.

5. We shall consider assignments numbered 6, 7, 8 and 9 together, as they consist of the court's refusal to give certain instructions which it is unnecessary to set out in full. These requests are based upon the theory that to constitute an eviction the acts of the landlord must be permanent in their character and that they were done with the intent to deprive the tenant of the beneficial enjoyment of the property. Upon these questions an examination of the authorities discloses a wide diversity of judicial opinion, but we think that, except in certain cases where the intent of the landlord is valuable in determining the nature of the acts performed, the intent is immaterial, since the vital fact to be determined is the interference with the tenant's beneficial enjoyment of the premises. And in the case at bar, if the action of the landlord did work such an interference, the intent with which he acted is of no importance.

6. As to the permanence of the acts complained of, there is an equally wide divergence of opinion; but we adopt the doctrine expressed by the court in the case of *Edmison v. Lowry*, 3 S. D. 77, at page 81 (52 N. W.

583, at page 584, 17 L. R. A. 275, at page 278, 44 Am. St. Rep. 774, at page 776), in which the following instruction is approved:

“As to the matter of eviction. It is not necessary there should be any act of a permanent character, but any act which has the effect of depriving a tenant of the free enjoyment of the premises, or any part thereof, or any appurtenances pertaining to these premises, must be treated as an eviction; and I charge you that any act of the plaintiffs which has deprived the defendant of the enjoyment of the free right pertaining to and belonging to him as tenant may be treated as an eviction.”

This doctrine has also been approved by the Supreme Court of Washington in the case of *Wusthoff v. Schwartz*, 32 Wash. 337 (73 Pac. 407).

7. As to whether or not the offensive acts of which complaint is made should persist at the moment of actual abandonment would depend upon the circumstances and facts of the individual case and it should be left to the jury to determine. We conclude, therefore, that these instructions were properly refused.

8. Assignment No. 11 relates to the refusal of the following requested instruction:

“In construing the notice which defendant herein gave to plaintiff regarding the archway, I instruct you that this cannot be construed as a notice to terminate the tenancy unless you find that defendant was the lessee at that time. In other words, defendant cannot claim to be terminating any relation with the plaintiff and at the same time claim that he had assigned the lease in question and that no relationship existed between him and plaintiff. Such propositions are inconsistent and cannot be maintained.”

This instruction is correct and should have been given; but, as the question of such notice was imma-

terial and clearly did not figure in the deliberation of the jury, no material injury could result. Assignment No. 10 is covered by the discussion of assignment No. 4.

As to the instructions given by the court, we find them to be fair and a correct statement of the law. Finding no substantial error in the record, the judgment of the trial court is affirmed.

AFFIRMED. REHEARING DENIED.

MR. CHIEF JUSTICE MOORE, MR. JUSTICE BURNETT and MR. JUSTICE HARRIS concur.

Motion for injunction pending appeal granted March 30, 1915.

Petition to admit ordinance in evidence denied March 30, 1915.

Argued on the merits June 24, remanded July 13, 1915.

Petition for rehearing denied September 21, 1915.

LAIS v. SILVERTON.

(147 Pac. 398; 150 Pac. 269; 151 Pac. 712.)

Appeal and Error—Injunction Pending Appeal.

1. On appeal from a decree dismissing a suit to enjoin a city from letting contracts and making assessments for street improvements, a temporary injunction will be granted by the Supreme Court, restraining the city from levying upon, attempting to sell, or selling any of plaintiffs' property until the further order of the court.

Appeal and Error—Hearing—Evidence.

2. On appeal from a decree dismissing a suit to enjoin a city from letting contracts and making assessments for street improvements, the Supreme Court has no authority to make an order admitting in evidence upon the hearing a copy of an assessment ordinance enacted after the appeal was taken.

Municipal Corporations—Public Improvements—Remonstrances—Charter Provisions.

3. The Silvertown City charter authorizes the city to improve streets, and provides that the owners of two thirds of the property adjacent to the improvement may file with the council a written remonstrance against a proposed improvement, whereupon it shall not be proceeded with, and that each lot or part thereof shall be liable for the full cost of the improvement of the street abutting thereon. *Held* that, there

being no provision whereby the city may select a certain proportion of the depth of an adjoining tract and subject the designated portion to the cost of the improvement, the assessment would naturally fall upon the whole tract, and hence the area of the whole tract, and not merely its front footage, should be considered in determining whether two thirds of the property adjacent to the improvement is represented on a remonstrance.

Municipal Corporations—Public Improvements—Suits to Enjoin—Evidence.

4. In a suit to enjoin a street improvement, the evidence was unsatisfactory whether the land represented on a remonstrance against the improvement was two thirds of the land adjacent to the improvement, and, at defendant's request, the case was reopened for further evidence, but the evidence introduced was no more satisfactory than that previously introduced. Thereupon plaintiffs asked for a postponement until they could have an accurate survey made and procure the testimony of witnesses as to the actual area of the disputed tracts. *Held* that the court should have granted this request.

[As to taxpayers' actions, see note in *Ann. Cas.* 1913C, 895.]

Municipal Corporations—Public Improvements—Remonstrance.

5. Under a city charter providing that the owner or owners of two thirds of the land next adjacent to a street to be improved may file a written remonstrance against the proposed improvement, an administrator cannot sign a remonstrance on behalf of the real estate of the property under administration.

From Marion: WILLIAM GALLOWAY, Judge.

Statement by MR. JUSTICE BENSON.

A suit was brought in the Circuit Court for Marion County by J. G. Lais, J. M. Brown, E. J. Brown, M. Small, J. H. Brewer, A. F. Blackerby and Sophia Blackerby, to enjoin the City of Silverton from letting contracts and assessing plaintiff's property for certain street improvements. From a decree dissolving a temporary injunction and dismissing the suit, plaintiffs have appealed, and the case is presented to us now upon the motion of appellants for an order of this court enjoining defendant from levying upon, attempting to sell, or selling any of the property of plaintiffs, in carrying out such street improvement, pending the final disposition of this suit. There is also submitted a petition of plaintiffs asking this court to admit in

evidence upon the hearing here a copy of an assessment ordinance enacted by defendant since the appeal was taken herein, or to remand the case to the lower court, with directions to admit the same and consider it.

INJUNCTION GRANTED. PETITION DENIED.

Mr. Robert H. Down and *Mr. Walter C. Winslow*, for appellants.

Mr. Custer E. Ross and *Mr. John H. McNary*, for respondent.

MR. JUSTICE BENSON delivered the opinion of the court.

1, 2. Upon the authority of *Livesley v. Krebs Hop Co.*, 57 Or. 354 (97 Pac. 718, 107 Pac. 460, 112 Pac. 1), we think the motion for an injunction until the further order of this court should be granted. We are not advised of any authority which would justify us in making an order admitting in evidence an ordinance enacted since the appeal was perfected, and the petition therefor must be denied.

INJUNCTION GRANTED. PETITION DENIED.

Remanded July 13, 1915.

ON THE MERITS.

(150 Pac. 269.)

Department 1. Statement by MR. JUSTICE McBRIDE.

This is a suit to enjoin the City of Silverton from proceeding with the improvement of McClaine Street

in that city. The authority for improving streets and the procedure for that purpose are found in the following provisions of the charter:

“To provide for the opening of streets and to establish the grades of same; to provide for and to regulate the planking, paving, or otherwise improving the streets; building of sewers, and the laying of gas-pipes and water-mains. All such improvements shall be assessed to the property next adjoining it *pro rata* as per estimate of surveyor and all such improvements shall be undertaken after ten days’ notice by publication in some newspaper of the City of Silverton, and said notice shall appear in not less than two issues of said newspaper. The notice must specify the work to be done, and in what manner, and until five days after the expiration of said notice the owner or owners of two thirds of the property next adjacent thereto may make and file with the council a written remonstrance against the proposed improvement, and thereupon the same shall not be proceeded with. If no remonstrance be made and filed with the council, the council shall, within a reasonable time, and not more than three months after final publication of notice, proceed as hereinafter provided.”

Section 83, among other matters, provides:

“Each lot or part thereof shall be liable for the full cost of the improvement of the street abutting thereon.”

The matter was heard in the Circuit Court, where a decree was rendered in favor of defendant, from which plaintiffs appealed.

REMANDED. REHEARING DENIED.

For appellants there was a brief over the names of *Mr. Richard W. Montague*, *Mr. Walter C. Winslow* and *Mr. Robert Down*, with oral arguments by *Mr. Montague* and *Mr. Winslow*.

For respondent there was a brief with oral arguments by *Mr. Custer C. Ross* and *Mr. John H. McNary*.

MR. JUSTICE McBRIDE delivered the opinion of the court.

3, 4. We find only one serious question as to the regularity of the proceedings, and that relates to the sufficiency of the remonstrance against the improvement. It appears that the improvement in question extends to and abuts upon several large tracts of unplatted land, and that the original theory of the city was that only the front footage of such land should be counted upon the remonstrance, instead of the superficial area of the tracts; and, acting upon this theory, the council held that the remonstrance did not represent two thirds of the property "next adjacent" to the improvement, and was, therefore, ineffective. As there is no provision in the charter whereby the city may select a certain proportion of the depth of an adjoining tract and subject the portion so designated to the cost of the improvement, it would seem that the assessment would naturally fall upon the whole tract, and, this being the case, that the superficial area of the whole tract should be represented upon the remonstrance; and we so hold. So that, if two thirds of the superficial area of the tracts abutting upon the street appear upon the remonstrance, this proceeding must fail, otherwise it shall stand. The evidence upon this branch of the case is very unsatisfactory. After the case was closed defendant asked that it be reopened for the purpose of taking further testimony, and later Mr. Main, the city engineer of Silverton, was put upon the stand and testified to a state of facts which would leave the remonstrance with

slightly less than two thirds of the property represented upon it, but the data upon which the survey was made is such that it is no more satisfactory than the estimates made by plaintiffs' witness, which were confessedly short of mathematical accuracy. At the close of Mr. Main's testimony plaintiffs asked for a postponement until they could have the property accurately surveyed, and procure the testimony of witnesses as to the actual area of the disputed tracts. This the court refused, saying that the testimony just produced had made no impression on his mind. This remark indicates that the court was inclined to accept the front-foot theory of defendant, upon which theory the remonstrance was insufficient, instead of the superficial area theory, which we think is indicated by the charter, and, therefore, considered the testimony irrelevant. As the whole case turns upon this one point, it was and is important that the truth in regard to it be brought out, and the request of counsel for plaintiffs should have been granted.

It is a question which can be solved one way or the other to an absolute mathematical certainty, and the case will be remanded to the court below with directions to reopen it to both parties for further testimony on this point, and to make findings and decree as all the testimony on that subject shall indicate.

REMANDED. REHEARING DENIED.

MR. CHIEF JUSTICE MOORE, MR. JUSTICE BENSON and MR. JUSTICE HARRIS concur.

Denied September 21, 1915.

PETITION FOR REHEARING.

(151 Pac. 712.)

Department 1. **MR. JUSTICE McBRIDE** delivered the opinion of the court.

5. The original petition for rehearing in this cause has not changed our opinion as to the law applicable to this case, and is overruled; but by a supplemental petition the opinion of this court is requested as to the right of an administrator to sign a remonstrance on behalf of the real estate of the property under administration. This question arises in the case, and should be passed upon. The language of the charter of Silvertown is as follows:

“The owner or owners of two thirds of the land next adjacent thereto may make and file with the council a written remonstrance against the proposed improvement, and thereupon the same shall not be proceeded with.”

The administrator is not the owner of the property, and is only entitled to possession for the purposes of administration, the legal title passing directly to the heir. It follows, therefore, that the signature of the administrator upon a remonstrance is ineffective for any purpose. If it happen that he is an heir to an interest in the property, his signature will be good as to his interest, but no further. With this explanation we adhere to our original opinion.

REHEARING DENIED.

MR. CHIEF JUSTICE MOORE, MR. JUSTICE BENSON and MR. JUSTICE HARRIS concur.

Argued September 10, affirmed September 21, 1915.

DAVIS v. CARLTON LUMBER CO.

(151 Pac. 650.)

Master and Servant—Injuries to Servant—Workmen's Compensation Act—Applicability.

1. Plaintiff, a teamster, was injured when a lumber truck which he was driving swung around and knocked him off the dock of the defendant lumber company. The truck, which was driven down an inclined driveway, was not equipped with brakes, and it was the custom to drive it so close to the rail that the friction would act as a brake. Owing to the heaviness of the load, the truck swung around. The team with which plaintiff was provided was fractious. *Held*, that the action was governed by Employers' Liability Act (Laws 1911, p. 16), Section 1, declaring that all owners and contractors shall use every device for the protection and safety of their employees; and hence the defenses of contributory negligence and assumption of risk were not available.

[As to what is "injury" or "personal injury" within the meaning of the Workmen's Compensation Act, see note in *Ann. Cas.* 1915C, 921.

From Yamhill: WEBSTER HOLMES, Judge.

In Banc. Statement by MR. JUSTICE BEAN.

This is an action brought by plaintiff, John T. Davis, against the Carlton Lumber Company and the Carlton Fir Lumber Company to recover damages for an injury received by the plaintiff on April 21, 1914, while employed by the defendants as a teamster.

According to the complaint, the plaintiff, while so employed, was descending one of the companies' docks from the main lumber-yard to the planer and driving a team attached to a two-wheeled truck loaded with lumber, when the truck swung around, causing him to be knocked off the dock and producing the injury. The lumber-yard is located upon a dock or platform, no part of which is more than 10 or 12 feet above the ground. In order to get from the main part of the yard to the planing-mill, it is necessary to pass over

the dock or slip, which is 150 feet in length and declines something like 8 or 9 feet. The platform upon which Davis was driving was about 16 feet in width. Two timbers 12 inches wide were placed thereon, about 8 feet apart, leaving a driveway of that distance, with 3 feet on each side of the timbers, so that the driver had a 3-foot space upon which to walk and drive the team of horses down the incline. At the particular place of the injury it was necessary for the teamster to make a sharp turn and drive down the incline with the left wheel of the truck rubbing against the guard-rail at the left side of the driveway. The wheel, pressing against this rail, tended to brake or hold back the truck. At this place the load, as frequently happened, turned while rounding the curve from the dock to the driveway, so that the front of it swung over the walkway, striking Davis and knocking him off the walk to the ground beneath, which was covered with sticks and timber. Davis was required to drive at the front of the load with his right hand pressing against it, thereby attempting to guide it so that the load would not swing out over the walkway; but it was so heavy and swung so quickly that he could not hold nor guide it. Customarily one or two men accompanied each truck load down the incline, and were required to be at the rear end of the load of lumber to keep it from losing its balance. Because of the absence of a brake on the truck, the defendants adopted a way of braking or checking the truck, aside from driving so that the left wheel would press against the guard-rail, by requiring another laborer to place a stick or a 4x4 in such a position in relation to the right wheel that the truck would be checked and prevented from running away down the incline.

The specific charges of negligence are as follows: (a) The dock was constructed with sharp turns and angles. (b) The footpath is dangerous and unsafe, in that it is too narrow to allow the driver to work in safety, and to escape being hit by the swinging load of lumber and thrown therefrom. (c) The defendants negligently permitted debris, pieces of lumber, and waste material to accumulate on the pathway. (d) The pathway could have been of a width sufficient to enable the driver to work in safety without interfering with the efficiency of the work. (e) One of the horses in the team was fractious and unsafe. (f) The truck had no controlling instrumentality to keep it from swaying or being thrown around violently, and could have been provided with an appliance which would have prevented the same from swinging without interfering with its use. At the time of the accident the plaintiff had been at work for the defendants about 7 hours. The court refused to instruct the jury, as requested by defendants, that assumed risk and negligence of the plaintiff were defenses. On the contrary, it instructed that the case came within the purview of the Employers' Liability Act, and that such defenses could not be maintained. A verdict for \$1,000 was rendered by the jury, and from a judgment thereon defendants appeal.

AFFIRMED.

For appellants there was a brief over the names of *Mr. F. C. Howell, Messrs. Wilbur, Spencer & Beckett, Mr. A. L. Clark* and *Messrs. McCain, Vinton & Burdett*, with an oral argument by *Mr. Howell*.

For respondent there was a brief over the names of *Mr. Isham N. Smith, Mr. Lon L. Parker* and *Mr. Richard Talboy*, with an oral argument by *Mr. Smith*.

MR. JUSTICE BEAN delivered the opinion of the court.

The sole question contended for in this case is whether or not the same comes within the provisions of the Employers' Liability Act (Laws 1911, p. 16). The pleadings and the evidence in this cause bring the same within the scope of the above act: *Schulte v. Pac. Paper Co.*, 67 Or. 334 (135 Pac. 527, 136 Pac. 5). The proof fairly shows that the work in which the plaintiff was engaged at the time of the injury involved a risk or danger inherent therein. It appears that the walk for the teamsters beside the roadway, which had sharp curves and angles, was too narrow for safety; that other workmen had been knocked therefrom by loads of timber; and that the walk could have been widened; and the efficiency of the structure still have been preserved. It is shown that waste material was allowed to accumulate on the walkway; that the truck had no brake or contrivance to keep the same from being thrown violently around across the pathway; that it was practicable to use instrumentalities which would have steadied the load and prevented it from swinging; that one of the horses in the team was fractious. The jury could fairly find under all the circumstances that on account of the negligence of the owner the premises were not a safe place for the plaintiff to work.

Section 1 of the Employers' Liability Act, after making specific requirements, contains the following command:

"And generally, all owners, contractors or subcontractors, and other persons having charge of, or responsible for, any work involving a risk or danger to the employees or the public, shall use every device, care and precaution which it is practicable to use for the protection and safety of life and limb, limited only by

the necessity for preserving the efficiency of the structure, machine or other apparatus or device, and without regard to the additional cost of suitable material or safety appliance and devices."

It is the position of counsel for defendants that the case does not come within either the specific provisions or the general clause of the act. It may now be regarded as settled by the decisions of this court that the general clause of the law quoted above is not restricted to the particular persons and acts mentioned in the first part of the section, but that it amplifies the scope of the statute, by extending its injunction to all persons having charge of or responsible for any work involving a risk or danger to the employees or the public: *Dunn v. Orchard Land & Timber Co.*, 68 Or. 97 (136 Pac. 872); *Heiser v. Shasta Water Co.*, 71 Or. 566 (143 Pac. 917); *Reed v. Western Union Tel. Co.*, 70 Or. 273 (141 Pac. 161); *Browning v. Smiley-Lampert Lumber Co.*, 68 Or. 502 (137 Pac. 777); *Hartman v. Oregon Elec. Ry. Co.*, *ante*, p. 310 (149 Pac. 893). In other words, that meaning should be given to the clause quoted which its language plainly imports. It directs that, in the kind of work described therein, every device, care and precaution shall be used which it is practicable to employ. When it is averred and proved that in hazardous employments, coming within the purview of such clause, an injury to life or limb results on account of the neglect to use such devices and care, when the same could have been done practicably without destroying the efficiency of the apparatus used or impairing the result of the work, the persons named are liable to respond in damages therefor.

The cause having been properly tried under the statute, there was no error in the refusal of the trial court

to instruct the jury according to the rules of the common law upon the questions of assumption of risk and contributory negligence.

Finding no error in the record, the judgment of the lower court is affirmed.

AFFIRMED.

MR. JUSTICE MCBRIDE did not sit.

Argued September 10, affirmed September 21, 1915.

MCGEE v. CARLTON LUMBER CO.

(151 Pac. 652.)

Master and Servant—Injuries to Servant—Workmen's Compensation Act.

1. Plaintiff, a teamster, was injured by coming in contact with a mono-rail transfer while driving a wagon on a dock of the defendant. The wagon crowded the horses, one of which was fractious, and plaintiff nearly lost his balance, and in attempting to hold on raised his head, which came in contact with the plank of the mono-rail, which was only six inches above the top of the wagon-bed. *Held*, that plaintiff's action was governed by the Employers' Liability Act (Laws 1911, p. 16), and the master could take advantage of neither the defense of contributory negligence nor assumption of risk; the place of work and appliances being dangerous.

[As to who is "workingman" within meaning of the Workmen's Compensation Act, see note in *Ann. Cas.* 1913C, 28.]

Trial—Personal Injuries—Instructions—Requests.

2. Where no more specific instruction was requested, an instruction charging the jury that, if the servant was permanently injured, they should estimate what he was actually worth as a wage-earner by considering how many years he would have an earning capacity, and what would be a reasonable wage under the evidence, and should allow compensation only for the damages sustained by the injury, was sufficient.

From Yamhill: **WEBSTER HOLMES**, Judge.

In Banc. Statement by **MR. JUSTICE BEAN**.

This is an action brought by the plaintiff, **M. A. McGee**, against the defendants, the Carlton Lumber

Company and the Carlton Fir Lumber Company, to recover damages for a personal injury he received on April 28, 1914, while in their employ. McGee was employed as a teamster by the defendants, and was injured by coming in contact with a mono-rail transfer while driving a wood wagon upon one of their docks. The plant of the defendants, so far as material here, is located upon the ordinary docks which are to be found around ordinary lumber-yards. Their sawmill and planing-mill are situated at the extreme west end of the plant, and at that point slabs accumulate as the logs are sawed. When some member of the companies desires a load of wood, it is delivered to him by their employees by a team and wagon belonging to the companies. The wagons used for this purpose are similar to those in use in other woodyards. They are so constructed that the bed may be pushed backward by means of a crank, so that it will dump its contents. A board about 80 inches in width and 30 inches in length is placed on the extreme front and on a level with the bottom part of the bed. There is no brake on the wagon. The docks of the defendant companies are at no point more than 10 or 12 feet above the ground. They are merely plank driveways over which lumber is transported from one part of the yard to another. The defendants have what is known as the mono-rail, which is operated upon a stationary track consisting of one rail a number of feet above the ground. By means of this mono-rail lumber is carried from one part of the yard to another. They also have what is called a mono-rail transfer, which consists of two large timbers more than 50 feet apart and about 8 feet above the floor of the dock. At the time the plaintiff received his injury he was driv-

ing one of these wood wagons from the dock. After he had passed under the west timber of the mono-rail transfer, as he stated, he thought he heard someone call, raised up from the board or seat which was on the bottom of the bed of the wagon, and while standing up came in contact with the east timber of the mono-rail transfer, thereby catching his head between it and the wagon-bed, producing the injury.

The plaintiff alleged that the harness used on the horses which he was driving had no breeching; that there was no brake on the wagon, and by reason thereof, on account of a slight descent to pass under the mono-rail timbers, the wagon ran forward and caused the horses to move at a more rapid rate of speed than they would otherwise have done; that one of the horses was fractious and the team hard to manage; that the heavy supporting timbers of the mono-rail were too close to the driveway and to the top of the load or wagon-bed containing wood, leaving no room for the driver to stand on any part of the wagon and pass under the mono-rail; that the roadway beneath the mono-rail timbers sags or slopes, making either end thereof slanting; that there were no warning signs or notices of any kind above or near the timbers of the mono-rail to caution the workmen of their approach thereto; that there was no foot-rest whereby the driver could brace himself, and no handhold or safeties with which the driver could steady himself or hold to while driving the team down the incline—all of which could have been provided for without destroying the efficiency of the structure or work.

The defendants' answer is framed upon the theory of a common-law action and sets forth the following defenses: (1) Assumption of risk; and (2) contribu-

tory negligence. The reply put in issue the affirmative defenses. Upon the trial a verdict was rendered in favor of plaintiff for the sum of \$2,000. To obtain a reversal of the judgment thereon, the defendants appeal.

AFFIRMED.

For appellants there was a brief over the names of *Mr. F. C. Howell*, *Mr. A. L. Clark* and *Messrs. Wilbur, Spencer & Beckett*, with oral arguments by *Mr. Howell* and *Mr. Clark*.

For respondent there was a brief over the names of *Mr. Isham N. Smith*, *Mr. B. A. Kliks*, *Mr. Lon L. Parker* and *Mr. Richard Talboy*, with an oral argument by *Mr. Smith*.

MR. JUSTICE BEAN delivered the opinion of the court.

The defendants claim that the action comes within the rules of the common law and requested an instruction accordingly. The court refused this request, and instructed the jury according to the provisions of the Employers' Liability Act. The defendants assign this as error.

1. A summary of the plaintiff's evidence furnishes a fair setting for the case. He testified in part as follows:

"A. My orders was, when I went out of the barn, by the barn boss, Mr. Schaer, to get the load as soon as possible, and he would wait for me up to the barn. And I went down, and I can't remember whether I took down a load of lumber to the planing-mill or not; but anyway I went and got the load of wood as soon as I could get it, and come up to the driveway you are supposed to drive into, and it was blocked with three truck-loads of lumber, two side by side, and the other in ahead. I forget which side of the driveway they

were on, but two side by side here, and the other one over on this side, and you couldn't get through with one horse single, and Swanson, one of the teamsters, was down by the mono-rail, and I stopped my team by the first turn as I got up on the main driveway, and Swanson, knowing what the orders was, hollered for me to come up. I hollered up, 'Is it open?' and he says it was not open, 'but there is one; I will pull it across so as to let you through,' which he did. He passed me just around the corner from the mono-rail. I turned and started down under the mono-rail and sat down on the foot-rest or seat, whichever you might call it, to avoid danger. No breeching on my harness, no brake on the wagon, and no self-guard for a man whatever, not even a finger hole to grab hold of, unless you grabbed hold of the wagon. In going down I had the lines in both hands to hold the horses, they were a little hard in the mouth, and that load crowding them there, and they were not deadheads, wouldn't stand no whip, they got to going, and no foot-rest—there is a chain that holds up the tongue, that runs out in front, that is the only foot-rest there is. * *

"Q. Go ahead and tell what you did.

"A. Well, that is all the foot-rest you've got, and when I got down the hill it tipped so I was practically off the seat, and I knew what the result would be if I fell. I would get run over, if I didn't get kicked to pieces by that fractious horse. * *

"A. I was practically off the seat when I got down this first driveway. This first incline to show you here. I took my hand up on this, holding the lines in one hand, to pull myself up, and I wouldn't be positive somebody hollered, which was frequently done if they wanted one of the teamsters, or whistle, and in case they don't hear, they might see them and motion to come there, and at the time I pulled myself up, thinking that hollering was behind me. Why then, as I pulled myself up, the timber must have hit me in the head and drove my face right into the front end of the load of wood."

Other evidence detailed the circumstances and described the premises as stated above. There is practically no controversy as to the main facts of the case. The main feature of the case is much the same as that in *Davis v. Carlton Lumber Co. et al.*, ante, p. 441 (151 Pac. 650), in which an opinion has been this day rendered. What was said in that case need not be repeated here. The evidence tended to support the allegations of the complaint. It disclosed that the work in which plaintiff was engaged involved a risk or danger to him; that there was a lack of the use of devices, care and precaution on the part of defendants for the protection and safety of life and limb; that an injury to plaintiff resulted; that it was practicable to have taken the necessary precautions. The general clause of the Employers' Liability Act (Laws 1911, p. 16) applies to the facts in this case. It requires all persons having charge of or responsible for any work involving a risk or danger to the employees or the public to use every device, care and precaution which it is practicable to use for the protection and safety of life and limb. If there was not sufficient room to drive a loaded wagon under the supporting timbers of the mono-rail, it was the duty of the defendants to "have made sufficient room," or have refrained from using the space or driveway, according to the rule announced by the court through Mr. Justice RAMSEY in *Wasiljeff v. Hawley Pulp & Paper Co.*, 68 Or. 487 (137 Pac. 755, at page 760, paragraph 6).

There is little room for argument but that the work was dangerous and the place unsafe to drive a team and wagon under timbers with a space of only about 6 inches between the top of the wagon-bed and the timbers. It would seem that the other accouterments com-

plained of tended to increase the danger. There was no error in charging the jury according to the provisions of the Employers' Liability Act, and that the defenses of assumption of risk and contributory negligence pleaded by defendants were not available: *Wol-siffer v. Bechill Bros.*, 76 Or. 516 (146 Pac. 513).

2. Defendants' counsel objected and excepted to that part of the charge to the jury pertaining to the measure of damages for a permanent injury. The court instructed the jury, in effect, that, if they found that the plaintiff was permanently injured, they should estimate what he was actually worth as a wage-earner, by considering how many years he would have an earning capacity, what would be a reasonable wage, and how much he would earn, and all the elements shown by the evidence, and by only allowing compensation for the damages he sustained by reason of the injury. It is urged that the illustration used by the court was of a different import, but we do not so construe the instruction taken as a whole. We find no request for a more specific instruction upon this point. The verdict does not indicate that the jury was misled by the illustration used by the court. Under the circumstances, we think the charge was sufficient: *McClagherty v. Rogue Riv. Elec. Co.*, 73 Or. 135 (140 Pac. 64, 144 Pac. 569).

We find no reversible error in the record. The judgment of the lower court is therefore affirmed.

AFFIRMED.

MR. JUSTICE McBRIDE did not sit.

Argued September 8, reversed September 21, 1915.

STATE v. PERRY.

(151 Pac. 655.)

Intoxicating Liquors—Offenses—Furnishing Liquor to Convicts.

1. Under Laws of 1913, page 266, making it an offense to give, sell or furnish intoxicants to any person sentenced to serve a term in the penitentiary, the fact that defendant did not know the person to whom he was furnishing intoxicants was a convict is no defense; the crime being wholly statutory.

Statutes—Construction—Title of Acts.

2. Laws of 1913, page 266, is entitled an act to prevent the sale or furnishing of intoxicating liquors to any convict or prisoner in the state penitentiary. The body of the act makes it an offense to sell or furnish liquor to any person sentenced to serve, or serving, a term in the penitentiary. Article IV, Section 20, of the Constitution, provides that every act shall embrace but one subject and matters properly connected therewith, which subject shall be expressed in the title. *Held* that, in view of the restrictive title of the act, it did not apply to paroled convicts not in the penitentiary, and it was no offense for one to furnish them with liquor.

[As to the constitutional requirement that a statute must embrace but one subject and that the title must express it, see note in 61 Am. Dec. 337.]

From Marion: PERCY R. KELLY, Judge.

Department 2. Statement by MR. JUSTICE EAKIN.

The defendant, Joe Perry, was indicted and convicted of furnishing intoxicating liquors to a convict sentenced to serve a term in the Oregon state penitentiary. It was conceded on the trial that David Snyder, the person to whom the liquor was supplied, had been sentenced to the penitentiary, but at the time the liquor was furnished was out under parole and doing business for himself in the City of Salem. The defendant offered to prove that he did not know that Snyder was a convict. This testimony was refused by the court, and exception taken.

The indictment was found under the provisions of Chapter 151, Laws of 1913. The title of the act is as follows, so far as it relates to this transaction:

“An act to prevent the barter, sale, trading, giving or furnishing of intoxicating liquors * * to any convict or prisoner in the Oregon state penitentiary. * * ”

This act denounces a penalty upon the giving, selling or furnishing, or aiding in such selling, trading or giving to any person sentenced to serve or serving a term in the Oregon state penitentiary. **REVERSED.**

For appellant there was a brief over the name of *Messrs. Smith & Shields*, with an oral argument by *Mr. Roy F. Shields*.

For the State there was a brief and an oral argument by *Mr. Ernest R. Ringo*, District Attorney.

MR. JUSTICE EAKIN delivered the opinion of the court.

1. The defendant claims that the court erred in refusing to allow him to prove that he did not know that the person to whom the liquor was furnished was a convict. We cannot agree with this contention. This court has held in many cases that in purely statutory crimes, unless there is incorporated into the legislative definition of the offense the element of knowledge on the part of the defendant, the intent with which the act was done is not an ingredient of the offense, and that lack of knowledge on the part of the defendant is not a defense: *State v. Brown*, 73 Or. 325 (144 Pac. 444), and cases cited. The offense charged was purely *malum prohibitum*, and in such cases, unless the legislature so describes the crime as to make knowledge and intent an ingredient of the crime, the court will not ingraft that into the case.

2. Counsel for defendant claims that, this statute being broader than the title, the act falls within the prohibition of Section 20, Article IV, of the Constitution, which provides that every act shall embrace but one subject and matters properly connected therewith, which subject shall be expressed in the title. This subject has been fruitful of litigation, and has been many times before this court for adjudication. Mr. Justice WOLVERTON, in *Clemmensen v. Peterson*, 35 Or. 47 (56 Pac. 1015), says:

This provision "was designed by the framers of the Constitution that in every case the proposed measure should stand upon its own merits, and that the legislature should be fairly satisfied of its purpose by an inspection of the title, when required to pass upon it, so as not to be surprised or misled by the subject which the title purported to express."

Spaulding Logging Co. v. Independence Imp. Co., 42 Or. 394 (71 Pac. 132), holds:

"The intention of the Constitution plainly is that the subject of the proposed legislation shall be stated in the title, so that the members of the legislature and the public may thereby be informed of the subject on which the former are invited to vote and legislate, without the necessity of studying the entire bill; and the courts cannot reject as surplusage any material part of the title in order to make it conform to some other or different legislation."

Counsel for the state earnestly contend that this act reaches every convict sentenced to confinement in the penitentiary, whether in or out of that institution, and that the general subject mentioned in the title of furnishing liquor to a convict is sufficient to uphold the act; but we cannot agree with this. The title contains the words, "to prevent the furnishing of liquor to any

convict or prisoner *in* the penitentiary," and nowhere in the title is this subject enlarged, confining the legislation to convicts in the prison. No one on reading this title would dream that it was intended to or did go beyond those so confined.

"As the legislature may make the title to an act as restrictive as they please, it is obvious that they may sometimes so frame it as to preclude many matters being included in the act which might with entire propriety have been embraced in one enactment with the matters embraced in the title, but which must now be excluded because the title has been made unnecessarily restrictive. The courts cannot enlarge the scope of the title; they are vested with no dispensing power; the Constitution has made the title the conclusive index to the legislative intent as to what shall have operation; it is no answer to say that the title might have been made more comprehensive, if in fact the legislature have not seen fit to make it so": Cooley, Const. Lim. (7 ed.), p. 212.

This completely answers the argument of the state in the case at bar. The legislature might have included in the act the matter in issue here, but in the title of the act it saw fit to confine it to persons *in* the penitentiary, and under such a title it cannot be extended to a man who has been paroled and is out in business.

The judgment is reversed and the defendant discharged.

REVERSED.

MR. CHIEF JUSTICE MOORE, and MR. JUSTICE HARRIS
concur.

MR. JUSTICE BEAN dissenting.

Argued September 13, affirmed September 21, 1915.

MANN v. W. A. GORDON CO.

(151 Pac. 704.)

Garnishment—Jurisdiction—Complaint.

1. A complaint, labeled "Allegations and Interrogatories," which set up that the defendant was indebted to the garnishee, is sufficient to give the court jurisdiction of the garnishment proceeding, though no interrogatories were filed.

Assignments for Benefit of Creditors—Validity—Insolvency Act.

2. Where a debtor corporation assigned funds held by a trustee to one of its creditors, who was to prorate the payment with other creditors, and there was a partial payment *pro rata* of the debts, such payment not discharging the same, the assignment was not ineffective as a void attempt at a statutory assignment.

[As to when an assignment is deemed fraudulent and the effect of the fraud thereon, see note in 58 Am. St. Rep. 74.]

Corporations—Corporate Officers—Powers of.

3. The payment of debts is part of the ordinary business of a corporation, and in the absence of proof to the contrary it will be presumed to be within the scope of the authority of a general manager, whether he be acting as an officer *de jure* or *de facto*.

Corporations—Officers—Authority of General Manager.

4. An officer of a corporation may be authorized to act for it by parol, and proof of his authority may be shown in that manner; a special resolution of the board of directors being unnecessary.

From Multnomah: HENRY E. MCGINN, Judge.

Department 2. Statement by MR. JUSTICE BENSON.

On April 1, 1914, S. C. Mann began an action against the W. A. Gordon Company, a corporation, for the recovery of \$2,097.20, and on the same day a writ of attachment was issued therein. On April 10th the writ and a notice of garnishment were served upon R. L. Sabin, who was supposed to have in his possession certain funds belonging to the defendant corporation. On April 23d, Sabin having failed to make any return under the garnishment proceedings, plaintiff filed a

complaint, labeled "Allegations and Interrogatories," against the garnishee, setting out the facts, and praying that Sabin be required to appear and answer as to the property in his hands subject to attachment for the debts of the defendant corporation. The garnishee filed his answer to this complaint, denying that he had any property in his hands belonging to the W. A. Gordon Company, and alleging affirmatively that on March 23, 1914, one G. R. Knight had assigned to him certain personal property in trust for the use and benefit of the creditors of said G. R. Knight, of which the W. A. Gordon Company was one; that on April 2, 1914, the W. A. Gordon Company had made and delivered to the Wasco Warehouse Milling Company its order upon Sabin, directing him, as such trustee, to pay to the order of the Wasco Warehouse Milling Company, for itself and others named, any moneys due or to become due from him on account of the claim of the W. A. Gordon Company against G. R. Knight; that the said order was presented to him on April 2d, and was then accepted by him; that on April 10th there was no property in his hands belonging to the W. A. Gordon Company. A reply having been filed, a hearing was had, resulting in a judgment of the trial court in favor of the garnishee, and plaintiff appeals. **AFFIRMED.**

For appellant there was a brief and an oral argument by *Mr. Leroy Lomax*.

For respondent there was a brief over the name of *Messrs. Huntington & Wilson*, with an oral argument by *Mr. Bela S. Huntington*.

MR. JUSTICE BENSON delivered the opinion of the court.

1. Respondent contends that the trial court never acquired jurisdiction of the proceeding, for the reason that no interrogatories were filed by appellant with his complaint. We cannot agree, however, with this position, for it appears to us quite clear that the allegations filed by plaintiff are sufficient to give the court jurisdiction, and we think that the case of *Smith v. Conrad*, 23 Or. 206 (31 Pac. 398), cited by respondent, fully sustains our view.

2. We therefore proceed to consider appellant's assignments of error. These are several in number, but as counsel for appellant has properly said in his brief:

"Each and every assignment relates directly or indirectly to the one principal question, viz., the legal effect of the writing involved."

This writing about which the entire controversy centers reads thus:

"Mr. R. L. Sabin, Secretary Merchants' Protective Assn., Portland, Oregon—

"Dear Sir: Please pay to the order of the Wasco Warehouse Milling Company, in trust for itself and R. P. Anderson of Haines, Oregon, Grand View Feed & Fuel Company of Grand View, Washington, Gaston Gardens Company, Portland, Oregon, S. C. Mann, North Powder, Oregon, and R. R. Wilson, of Baker, Oregon, any moneys due or to become due from you on account of the claim of the W. A. Gordon Company against G. R. Knight, and the receipt of said Wasco Warehouse Milling Company will be a receipt to you for said money.

"Dated Portland, Oregon, this 2d day of April, 1914.

"THE W. A. GORDON COMPANY,

"Per R. P. KNIGHT,

"Secretary.

"Received this notice April 2, 1914, 2:45 P. M.

"R. L. SABIN."

Plaintiff contends that this transfer is ineffective for any purpose for several reasons: (1) That it is a void attempt to make a statutory assignment under the insolvency laws of the state, and ineffective because it does not comply fully with the statute; (2) because it purports to be the unauthorized act of the secretary of the corporation, and therefore void; (3) that there is no competent evidence that R. P. Knight was the secretary of the defendant corporation.

The testimony as a whole was not sent up, but from the fragments included in the bill of exceptions we gather that W. A. Gordon was the president and general manager of the corporation, exercising practically all the powers thereof; that R. P. Knight was the secretary; that in the fall of 1913 Gordon left the state, leaving Knight, the secretary, in absolute control of the corporate affairs. The record is silent as to the extent of the corporation's assets, or as to the number or names of its creditors, and also as to the extent of its liabilities. As already stated, the plaintiff was a creditor, and on April 1st began an action to recover his debt. The Wasco Warehouse Milling Company was also a creditor, and had been pressing the corporation for a settlement of its claim. Among the assets of the W. A. Gordon Company was a claim against one G. R. Knight, who had made an assignment for the benefit of his creditors, naming Sabin as trustee. As such trustee, Sabin had in his possession on April 2d some moneys which were subject to application upon the claim of the Gordon Company. On that day the secretary of the corporation, in order to avoid a lawsuit with the Wasco Warehouse Milling Company, gave it the order heretofore set out, which was accepted by the Milling Company, subject to the condition that it would

divide the money so received *pro rata* with certain other creditors named in the order. On the same day this order was presented to Sabin, who indorsed it as above indicated.

R. P. Knight testified without objection that he was the secretary of the company and was in charge of its business at the time these transactions occurred. This evidence, taken in connection with the form of the order above set out, does not disclose any effort at making such an assignment as is contemplated by the state insolvency act, but simply a partial payment, *pro rata*, of certain debts of the corporation. It does not in any sense act as a discharge of any debt remaining unpaid, either in whole or in part. It has no other effect than a mere payment *pro tanto* of such debts.

3. To us it seems clear that such payment of debts is a part of the ordinary business of a corporation, and in the absence of proof to the contrary may be presumed to be within the scope of the authority of a general manager, whether he be acting as an officer *de jure* or *de facto*.

4. As to the admissibility of the evidence touching R. P. Knight's authority to execute the order, we note that 4 Thompson's Corporations (1 ed.), section 4624, says, in effect, that proof of the authority of an officer to act for a corporation need not be made in the form of a resolution of the board of directors, duly entered upon the records of the corporation, conferring the authority upon the officer; but the act of the directors may be shown by an oral vote, and may be otherwise proved by parol, and often equally well by circumstantial evidence. In the case of *Markham v. Loveland*, 69 Or. 451 (138 Pac. 483), commenting upon this, Mr. Justice BURNETT says:

“Under modern business conditions, where the commonest every-day transactions are corporate acts, it would be intolerable if everything were required to be proven by a special resolution of the board of directors in each instance.”

Finding no error in the record, the judgment of the lower court is affirmed.

AFFIRMED.

MR. CHIEF JUSTICE MOORE, MR. JUSTICE BEAN and MR. JUSTICE HARRIS concur.

Argued September 7, reversed September 21, 1915.

STATE v. LOUIE HING.

(151 Pac. 706.)

Criminal Law—Evidence—Admissibility—Uncertified Paper.

1. In a prosecution for murder, an uncertified paper, being the deputy county clerk's memorandum, purporting to show that defendant, when arraigned, stated his true name to be another than that under which he was indicted, was incompetent, where there was a journal entry showing the arraignment, which might be proved under Section 752, L. O. L., providing that judicial records may be proved by the production of the original, or a copy thereof, certified by the clerk having custody thereof.

Witnesses—Impeachment—Character.

2. Evidence of the good reputation of a witness for the state for truth was inadmissible where the reputation of such witness had not been impeached, except by contradiction of his testimony; Section 865, L. O. L., providing that the good character of a witness is not admissible until the character of such witness has been impeached.

[As to impeaching witnesses, see note in 14 Am. St. Rep. 157.]

Criminal Law—Appeal and Error—Review—Evidence.

3. In a murder case, an assignment of error that there was no evidence to warrant an instruction on manslaughter will not be examined, where it does not appear that the bill of exceptions contained all of the evidence.

From Multnomah: **GEORGE N. DAVIS**, Judge.

Department 1. Statement by MR. JUSTICE HARRIS.

Louie Hing was indicted for murder in the second degree on account of the killing of Lum Fong. A trial resulted in a verdict finding the defendant guilty of manslaughter. It is related in the bill of exceptions that three Chinese witnesses, Seid Jan, Ju Foo and Chin Sing, in support of the indictment, testified that on the night of March 16, 1913, the defendant, accompanied by another Chinese, entered a store conducted by the deceased at 81 Second Street, in Portland; that, Louie Hing having asked Lum Fong for 5 cents worth of olives, the latter delivered the olives to the defendant, who then paid Lum Fong; and that the defendant shot Lum Fong when the latter was about to deposit the money in the cash register. The state also called a detective and captain of police, each of whom testified that diligent search had been made for the defendant until the time of his arrest. E. J. Kennedy, the assistant county jailer, declared that the defendant gave Gun Shing as his name, and refused to answer to the name of Louie Hing while in jail. P. Maloney and Tom Swennes, city detectives, deposed that the defendant gave Gun Shing as his true name when he was arrested. The court also received in evidence a paper, taken from the office of the clerk, purporting to show that the defendant, when arraigned, answered that his true name was Gung Shing. The defense called two Chinese witnesses, Lee Yin and Lee Jock, who testified that on the night of March 16, 1913, at the time of the killing, Louie Hing was in The Dalles, Oregon, where he had been for four or five days prior to that time. Lee Gin, a witness for the defendant, testified that at the time of the homicide Seid Jan was dealing fan-tan in a gambling-room which was separated from

the place where Lum Fong was shot, and that Seid Jan could not have witnessed the killing. The defendant also introduced evidence which tended to show that at the time of the homicide a tong war was being waged in Portland between the Bow Leong Tong and the Hop Sing Tong, and that the deceased and some of the witnesses for the state belonged to the Bow Leong Tong, while the defendant and Lee Yin were members of the Hop Sing Tong. In rebuttal the state offered evidence tending to show that the general reputation of Seid Jan for truth and veracity was good. The bill of exceptions declares that there was evidence as already related, but does not affirm that there was no additional evidence. The defendant appealed from the judgment pronounced upon the verdict.

REVERSED AND REMANDED.

For appellant there was a brief over the names of *Mr. Leon Yanckwich*, *Mr. Daniel E. Powers* and *Messrs. Fulton & Bowerman*, with oral arguments by *Mr. Yanckwich* and *Mr. Jay Bowerman*.

For the state there was a brief over the names of *Mr. John A. Collier*, Deputy District Attorney, *Mr. Walter H. Evans*, District Attorney, and *Mr. Joseph L. Hammersly*, Deputy District Attorney, with an oral argument by *Mr. Collier*.

MR. JUSTICE HARRIS delivered the opinion of the court.

1. The defendant excepted to the introduction of an uncertified paper which purports to show that, when arraigned, he stated his true name to be Gung Shing. E. P. Mahaffie, after stating that he was deputy county clerk, and as such had charge of the Circuit Court

work, including the criminal business, testified that the paper was made up in the office of the county clerk and constitutes the clerk's memorandum, which is entered in the journal; that it had been the custom of the deputy clerk in the criminal department to make notes of what was done in a case, and afterward to deliver the notes to the witness, who then drew the clerk's memorandum, which was not only used for making an entry in the journal of the court, but was also filed and became a part of the permanent record of the case. Mr. Mahaffie further testified that he had no recollection of being present at the time the defendant was caused to plead, but that the information contained in the paper was either received from the office of the district attorney or had been brought to him by another deputy clerk. The paper was not competent. The defendant was indicted under the name of Louie Hing. It is explicitly commanded by Section 1466, L. O. L., that:

"If the defendant allege that another name is his true name, the court must direct the entry thereof to be made in its journal, and the subsequent proceedings on the indictment may be had against him by that name, referring also to the name by which he is indicted."

The journal of the court, therefore, is made the judicial record and final memorial of what occurs upon the arraignment of an accused person who alleges that another name is his true name. A judicial record of this state, by the terms of Section 752, L. O. L., "may be proved by the production of the original, or by a copy thereof, certified by the clerk or other person having the legal custody thereof, with the seal of the court affixed thereto, if there be a seal." If the journal contained no entry showing the arraignment, then quite a

different question would be presented; but, in the absence of evidence to the contrary, it will be presumed that official duty was performed, and that the journal does in fact contain a record of the arraignment; and, furthermore, the evidence tends to show that an entry was actually made in the journal. An entry having been made in the book specified by Section 1466, L. O. L., it necessarily follows that the journal is the original judicial record of the name given by the defendant when arraigned. The paper complained of was not competent evidence, because it was neither the original judicial record nor a certified copy of the original, but was only a writing which was used for the convenience of the clerk. Undoubtedly, the paper, which pretended to recite what the defendant said when formally accused in open court with the crime of murder, carried more weight with the jury than the oral testimony of witnesses, because the writing had the semblance of an indisputable court record, while the oral statements of the jailer and detectives rested only upon human memory. The state was entitled to show by any available competent evidence that the defendant assumed a name different from his true name. The prosecution could have offered the journal of the court, or a certified copy; but the reception of the paper objected to was, on the record as written in the bill of exceptions, prejudicial to the substantial rights of the defendant.

2. The next assignment of error involves the testimony of W. E. Gray, a clerk in the employ of the Merchants' National Bank, and of J. G. Burness, a teller in Ladd & Tilton's Bank. After telling the jury how long Seid Jan had transacted business with the banks mentioned, these two witnesses were permitted

to testify, over the objection of defendant, that the general reputation of Seid Jan for truth and veracity was good. It will be remembered that Seid Jan swore that he saw Louie Hing shoot Lum Fong. The defendant did not offer any evidence concerning the reputation of Seid Jan for truth and veracity. The state contends that the evidence of Lee Gin, who testified that Seid Jan was dealing fan-tan in a gambling-room and could not have witnessed the homicide, constitutes an assault upon the character of Seid Jan which authorized the evidence objected to. It is provided in Section 865, L. O. L., that evidence of the good character of a witness is not admissible in any action, suit or proceeding, "until the character of such witness has been impeached"; and this statutory provision is only declaratory of the common-law rule which prevailed prior to its enactment: *National Bank v. Assurance Co.*, 33 Or. 43 (52 Pac. 1052). In the case of *Glaze v. Whitley*, 5 Or. 165, it was ruled that evidence of good character is admissible whenever a witness has been impeached in any of the ways provided for in Sections 863 and 864, L. O. L.; but that case was overruled by the decision in *Sheppard v. Yocum*, 10 Or. 402. To warrant evidence of the good character of a witness, there must have been evidence tending to impeach the character of that witness, and evidence of contradictory statements will not suffice: *Sheppard v. Yocum*, *supra*; *Osmun v. Winters*, 25 Or. 260 (35 Pac. 250); *National Bank v. Assurance Co.*, *supra*. The testimony of Lee Gin directly contradicts Seid Jan; and, while the stories told by the two witnesses cannot both be true, still it is simply a case of one witness contradicting another. To permit the introduction of evidence of good character every time a witness is

contradicted by an opposing witness would cause delay and multiply the issues in almost every controversy presented in court. The rule adhered to in most jurisdictions, and the one sustained by the logic of prior adjudications in this state, makes evidence of the witnesses Gray and Burness inadmissible: 3 Ency. of Ev. 18; *State v. Nelson*, 13 Wash. 523 (43 Pac. 637). In the note to the well-considered case of *First National Bank v. Blakeman*, 19 Okl. 106 (91 Pac. 868), as reported in 12 L. R. A. (N. S.) 364, the editor states:

“The authorities are nearly unanimous in holding that the mere fact that a witness’ testimony is contradicted by opposing testimony does not warrant the introduction of evidence as to his reputation for truth and veracity.”

It is true that in the final charge to the jury the court told the triers of the facts to disregard all the testimony of the witnesses touching the general reputation of Seid Jan for truth and veracity. Three Chinese testified for the state, and the same number of Chinese appeared as witnesses for the defendant. If the jury believed the three for the state, it was because they did not believe the Chinese who testified for the defendant. The element of honest mistake could not have entered into the testimony of any one of the six Chinese witnesses. Each set of three Chinese either told the truth or deliberately falsified, and in that state of the record the admission of the incompetent writing constituted more than a mere technical error, because it may have had much weight with the jury in determining which group of Chinese testified to the truth. It is likewise doubtful whether the language employed by the court in withdrawing the evidence of the witnesses Gray and Burness from the consideration of the jury was suf-

ficiently emphatic to accomplish the purpose intended or enough to unring the bell. The language of Mr. Chief Justice McBRIDE in *State v. Rader*, 62 Or. 37 (124 Pac. 195), is peculiarly appropriate to the instant case:

“While in some cases an express instruction to the jury to disregard testimony injuriously admitted is properly held to cure the error, yet the courts are cautious in the application of this rule. It is not an easy task to unring a bell, nor to remove from the mind an impression once firmly printed there, and the withdrawal of the testimony should be so emphatic as to leave no doubt in the mind of the juror as to the unequivocal repudiation by the court of the erroneously admitted matter, and even then, in a case where the testimony is evenly balanced or contradictory, courts hesitate to sanction such withdrawal, though it seems absolutely necessary to permit this course in some instances.”

3. The defendant contends that there was no evidence to warrant an instruction on manslaughter; but this assignment of error will not be examined, because it does not appear that the bill of exceptions contains all the evidence received at the trial, nor is it shown that all the evidence bearing upon the question of the degree of the homicide is set forth: *State v. Lee Yan Yan*, 10 Or. 365; *Thomas v. Bowen*, 29 Or. 258 (45 Pac. 768); *State v. Magers*, 35 Or. 520 (57 Pac. 197); *Carney v. Duniway*, 35 Or. 131 (57 Pac. 192, 58 Pac. 105); *State v. Jancigaj*, 54 Or. 361 (103 Pac. 54).

The judgment is reversed and the cause is remanded for a new trial.

REVERSED AND REMANDED.

MR. CHIEF JUSTICE MOORE and MR. JUSTICE McBRIDE
concur.

MR. JUSTICE BURNETT delivered the following, concurring specially, opinion:

I readily agree to the able discussion of Mr. Justice HARRIS and his conclusions upon the two questions treated by him in the foregoing opinion. I am not in accord, however, with his refusal to consider the assignment of error based on the Circuit Court's instruction about manslaughter. The defendant's exception rests upon the postulate that there was no evidence in the case to justify a verdict of guilty of manslaughter. Section 171, L. O. L., as amended by Laws of 1913, Chapter 332, declares the rule for framing a bill of exceptions thus:

"No particular form of exceptions shall be required. The objection shall be stated with as much evidence, or other matter, as is necessary to explain it, but no more; provided, however, that the bill of exceptions may consist of a transcript of the whole testimony and all of the proceedings had at the trial, including the exhibits offered and received or rejected, the instructions of the court to the jury, and any other matter material to the decision of the appeal."

The amendment embodied in the proviso is not mandatory, and does not require absolutely that in all instances a full report of the proceedings and testimony shall be incorporated into or attached to the bill of exceptions. Moreover, we have ruled several times that a bill consisting of a *verbatim* rehearsal of all the testimony will be considered only for the purpose of determining the correctness of the trial court's decision on motions for nonsuit and directed verdict: *Redsecker v. Wade*, 69 Or. 153 (134 Pac. 5, 138 Pac. 485); *Keady v. United Railways*, 57 Or. 325 (100 Pac. 658, 108 Pac. 197); *West v. McDonald*, 67 Or. 551 (136 Pac. 650); *Willis v. Horticultural Fire Relief*, 69 Or.

293 (137 Pac. 761, Ann. Cas. 1916A, 449); *Abercrombie v. Heckard*, 68 Or. 103 (136 Pac. 875); *National Council v. McGinn*, 70 Or. 457 (138 Pac. 493).

The bill of exceptions is, in effect, the authoritative statement that so much of the evidence as is necessary to explain the exception is included in the bill. The document would acquire no additional force from a certificate of the trial judge in so many words that it quoted all the testimony on the disputed point. We are not at liberty to assume that he has violated his statutory duty by leaving out some testimony necessary or helpful in explaining the defendant's assignment of error. The cases cited by Mr. Justice HARRIS are not in conflict with this view when carefully analyzed. The sole question is: By what means shall the issue on the appellant's exceptions satisfactorily be made to appear? The Code says by a bill of exceptions, in which is contained so much and no more of the testimony as may be necessary to explain the exception. We ought not to import into the statute an additional requirement, and demand that the trial judge shall in effect certify that he has not violated his official duty by omitting matters material to the issue on appeal, yet such is the effect of holding that, after he has made up the bill, he must go further and declare that all has been said and there is nothing more to be included in the statement. The presumption is that he regularly performed his official duty in compiling the bill. If, consequently, there had been anything else bearing upon the point involved, the judge, in duty bound, would have embodied it in the bill. I am of the opinion, therefore, that the document contains sufficient data to require of us consideration and decision upon the propriety of giving any instruction about man-

slaughter. To hold otherwise is to invite the abomination of Plethoric bills of exceptions, which we have so often condemned, and which do so much to cloud issues and prolong litigation.

There are several kinds of manslaughter defined by our Code; Killing upon a sudden heat of passion, caused by an apparently irresistible provocation; death of a person caused by the negligence of the accused; assisting another to commit self-murder; producing abortion upon a pregnant woman; administration of a lethal drug by an intoxicated physician; and, in general, every killing of a human being not murder in any degree, if the same is not justifiable or excusable: Sections 1897-1902, L. O. L. Taking the bill of exceptions as authentic, there is no reasonable viewpoint disclosed from which we can discern any theory of the evidence meeting any Code definition of manslaughter. Taught by the record before us, the conclusion is plain that the defendant was either guilty of willful murder or was entitled to an acquittal. The instruction about manslaughter was a pure abstraction, not justified by any evidence. It invited the jury into the realm of mere speculation and guesswork. It disregarded the rights of the defendant, by exposing him to a danger not involved in the case, to wit, a haphazard verdict, without foundation in testimony. In addition to numerous decisions that abstract instructions constitute reversible error, this court has applied the doctrine to cases of homicide in *State v. Magers*, 35 Or. 520 (57 Pac. 197); *State v. Megorden*, 49 Or. 259 (88 Pac. 306, 14 Ann. Cas. 130); *State v. Caseday*, 58 Or. 429 (115 Pac. 287).

For this additional reason, the decision of the Circuit Court in the instant case ought to be reversed.

Argued September 8, affirmed September 21, 1915.

STATE v. HOLLINSHEAD.

(151 Pac. 710.)

Obscenity—Immoral Advertising—Indictment—Sufficiency—Statute.

1. Where an indictment for a violation of Section 2095, L. O. L., denouncing the advertising of the treatment or cure of venereal diseases, charged that defendant violated the law "by then and there exposing and exhibiting to the view of a large number of persons and displaying and publishing in the aforesaid county and state, a certain advertisement, to wit, a sign, in words and figures as follows, to wit," then setting out in full the objectionable matter, was sufficient.

[As to "knowingly" distributing or mailing obscene matter, see note in *Ann. Cas.* 1912A, 434.]

Statutes — Title — Amendment — Constitutional Provision — "Sexual" — "Venereal."

2. Under Article IV, Section 20, of the Constitution, providing that every act shall embrace but one subject, that shall be expressed in the title, where the title of Section 2095, L. O. L., denouncing the advertising of cures for sexual disease, was, as originally enacted, entitled "An act to prohibit the advertising of the treatment or cure of venereal or other diseases, declaring the same a misdemeanor and prescribing a penalty therefor" (Laws 1909, p. 229), the title to the amendatory act, reading "An act to amend Section 2095, L. O. L., relating to advertising to cure sexual diseases" (Laws 1913, p. 496), was sufficient, since to refer in the title of an amendatory act to that of the amended act is a sufficient statement of the subject of the amendatory act, while "sexual" is synonymous with "venereal."

Obscenity—Police Power—Prohibition of Advertising Venereal Cures.

3. Section 2095, L. O. L., denouncing the offense of advertising venereal cures, was constitutional as a valid exercise of the police power of the state, since it is against public policy to allow interested individuals to disseminate the notion that sexual disease is easily and cheaply cured, as tending to destroy a restraint on immorality.

Constitutional Law — Class Legislation — Prohibition of Advertising Venereal Cures.

4. Section 2095, L. O. L., denouncing the offense of publishing or advertising cures of venereal disease, was not unconstitutional as class legislation.

Constitutional Law—Equal Protection of Laws—Prohibition of Advertising Venereal Cures.

5. Section 2095, L. O. L., denouncing the offense of advertising venereal cures, was not invalid as infringing the constitutional guaranty of equal protection of the laws.

From Multnomah: GEORGE N. DAVIS, Judge.

Department 1. Statement by MR. JUSTICE BENSON.

Edwin Hollinshead was indicted for the violation of Section 2095, L. O. L., as amended by the legislature in 1913: Laws 1913, p. 496. The title of the original enactment is as follows:

“An act to prohibit the advertising of treatment or cure of venereal or other diseases, declaring the same a misdemeanor and prescribing a penalty therefor”: Laws 1909, p. 229.

The act, as amended, including the title, reads thus:

“An act to amend Section 2095, Lord’s Oregon Laws, relating to advertising to cure sexual diseases.”

The full text of the act, as amended, reads as follows:

“Any person who shall advertise or publish any advertisement intended to imply or to be understood that he will restore manly vigor, treat or cure lost manhood, lost power, stricture, gonorrhea, chronic discharges, gleet, varicocele or syphilis, or any person who shall advertise any medicine, medical preparation, remedy or prescription for any of the ailments or diseases enumerated in this act shall be deemed guilty of a misdemeanor and upon conviction thereof shall be punished by a fine of not less than \$100 nor more than \$1,000, or by imprisonment in the county jail for a period of not less than six months nor more than 12 months, or by both such fine and imprisonment. Any owner or managing officer of any newspaper in whose paper shall be printed or published any such advertisement as is described in this act shall be deemed guilty of a misdemeanor and upon conviction thereof shall be punished by a fine of not less than \$100 nor more than \$1,000, or by imprisonment in the county jail for a period of not less than 6 months or more than 12 months, or by both such fine and imprisonment.”

The indictment charges the defendant with having violated this law by advertising a certain proprietary remedy, guaranteed to cure gonorrhea or gleet. The defendant demurred to the indictment, assigning as the only ground therefor that the foregoing act is unconstitutional and void. The trial court overruled the demurrer, and, the defendant refusing to plead over, a judgment of conviction was entered against him, from which this appeal is taken. **AFFIRMED.**

For appellant there was a brief over the names of *Mr. Barnett H. Goldstein* and *Messrs. Joseph & Haney*, with oral arguments by *Mr. Goldstein* and *Mr. Bert E. Haney*.

For the State there was a brief over the names of *Mr. Walter H. Evans*, District Attorney, and *Mr. George Mowry*, Deputy District Attorney, with an oral argument by *Mr. Evans*.

MR. JUSTICE BENSON delivered the opinion of the court.

1. Defendant's first contention is that the indictment does not contain a statement of the facts constituting the offense with sufficient clearness and distinctness as to notify the defendant specifically of the offense for which he is to be tried. We cannot agree with the contention. The indictment very clearly and specifically states that the defendant violated the law "by then and there exposing and exhibiting to the view of a large number of persons, and displaying and publishing, in the aforesaid county and state, a certain advertisement, to wit, a sign, in words and figures as follows, to wit," and then sets out in full the objection-

able matter. This is so clearly sufficient that further comment is unnecessary.

2. The chief contention of defendant is, however, more serious, being the assertion that the statute upon which the prosecution is based is unconstitutional and void. It is first maintained that the act is defective, in that the subject thereof is not fairly expressed in the title, and that the act embraces more than one subject. The constitutional inhibition to which counsel appeals upon this point is as follows:

“Every act shall embrace but one subject, and matters properly connected therewith, which subject shall be expressed in the title. But if any subject shall be embraced in an act which shall not be expressed in the title, such act shall be void only as to so much thereof as shall not be expressed in the title”: Article IV, Section 20.

It must be observed that the title of the original statute as enacted in 1909 reads thus:

“An act to prohibit the advertising of treatment or cure of venereal or other diseases, declaring the same a misdemeanor and prescribing a penalty therefor.”

We think it will be conceded without argument that this title fully covers the scope of the act itself. The title of the amendment reads thus:

“An act to amend Section 2095, Lord’s Oregon Laws, relating to advertising to cure sexual diseases.”

In Funk & Wagnall’s New Standard Dictionary the word “sexual” is given as synonymous with “venereal,” and is so accepted in common usage. This court, in the case of *Ex parte Howe*, 26 Or. 182 (37 Pac. 536), speaking by Mr. Justice BEAN, says:

“Hill’s Annotated Laws is an authorized compilation of the statutes of Oregon, and to refer in the title

of a legislative act to the particular section of such compilation sought to be amended is a sufficient statement of the subject for a mere amendatory act, and if the provisions of the amendment could have been included in the original act without violating the Constitution, it is valid."

It follows that this contention of defendant must fail.

3-5. The next point presented is that the act is unconstitutional and void, in that it is class legislation, and is a violation of the constitutional guaranty of equal protection of the law. This may well be considered in connection with the final proposition that the act is void because it is not within the legitimate scope of the police power of the state and is a violation of the constitutional provision that no person shall be deprived of life, liberty or property without due process of law.

For many years it has been recognized by publicists and legislators that some drastic action is necessary to check certain social evils and to protect youthful and inexperienced humanity, not only from easy access to vicious and immoral practices, but also from the schemes of designing men, who, for the sake of financial profit, would prey upon the calamities of the unfortunate who have sowed the wind and reaped the whirlwind. Further than this, it has been thought that the act of spreading broadcast, by means of advertising, the idea that certain venereal diseases are easily and cheaply cured, is against public policy, in that it has a decided tendency to minimize unduly the disastrous consequences of indulging in dissolute action. These views were evidently the moving principle of our legislators in the passage of the act under discus-

sion. The purpose of the act is clearly in the interest of the public morals. It is not class legislation, for it applies to all who may be engaged in a like business. Similar legislation has been held valid in other states, upon both contentions. In the case of *People v. Kennedy*, 176 Mich. 384 (142 N. W. 771), the court, in passing upon a similar statute, says:

"It is the duty of the court to give effect to a legitimate legislative purpose plainly indicated, if it can reasonably be done, and not construe language so as to invalidate an act where the language is fairly susceptible of a construction consistent with validity. The act appears to be a reasonable police regulation."

Again, in the case of *Kennedy v. State Board of Registration*, 145 Mich. 241 (108 N. W. 730, 9 Ann. Cas. 125), the plaintiff, a physician, sought to enjoin the defendant from revoking his certificate for having violated a statute which, in part, reads thus:

"And provided further, after the passage of this act, the board may at its discretion revoke the certificate of registration, after due notice and hearing of any registered practitioner who inserts any advertisement in any newspaper, pamphlet, circular, or other written or printed paper, relative to venereal diseases or other matter of any obscene or offensive nature derogatory to good morals."

This was held to be a valid exercise of police power. In the case of *State v. Giantvalley*, 123 Minn. 227 (143 N. W. 780), Mr. Justice BUNN, of the Supreme Court of Minnesota, says:

"It is argued that, because defendant was admitted to the bar of Minnesota before the statute was enacted, the law deprived him of a vested right to advertise that he was a specialist in divorce matters, and is therefore unconstitutional. Granting that defendant's license to practice his profession gave him a right to advertise

his proficiency in any branch of it, such right was subject to regulation. The legislature decided that advertising for divorce business was contrary to public policy, and certainly the decision was justified. Rights of property far more valuable than any right defendant may have had to advertise his calling have been obliged to yield to considerations of public health, safety, and morals. We hold that the statute is valid."

We might multiply similar citations, but it is not necessary. We regard the statute in question as a valid exercise of the police power of the state, and the judgment of the trial court is affirmed.

AFFIRMED.

**MR. CHIEF JUSTICE MOORE, MR. JUSTICE MCBRIDE and
MR. JUSTICE BURNETT concur.**

Argued September 9, affirmed September 21, 1915.

LANDERS v. VAN AUKIN.

(151 Pac. 712.)

Schools and School Districts—Selection of School Site—Majority Vote.

1. Under Laws of 1913, page 303, Section 1, subdivision 14, providing that by a majority vote of any legally called school meeting a schoolhouse site may be selected, but that it shall require a two thirds vote to order the removal of a schoolhouse, where the chairman announced as business the selection of a site for a new schoolhouse, two nominations being made, the present site of the school and another, the ballot resulting in a majority vote for the new site, the selection of such site by such vote was proper; a two-thirds vote not being required, as in the case of the removal of a school.

Injunction—Adequate Remedy at Law.

2. Where the owner of land sought to be condemned as a school site contended that the majority vote whereby the voters of the district selected such site was not valid, a two-thirds vote being required by statute, she could not maintain her injunction suit against the school board to restrain it from the condemnation, since the defense could be set up in the condemnation proceedings themselves, as one

attempting to acquire the property of another by eminent domain must, as a condition precedent, show authority.

[As to injunction against illegal acts of municipal and other public corporations, see note in 2 Am. St. Rep. 92.]

Statutes—Remedial Statute—Construction.

3. A remedial statute should be construed to give it practical effect according to the lawmakers' intention.

Schools and School Districts—Tax Levy—Authorization—Statute.

4. Under Laws of 1913, page 300, Section 1, subdivision 5, providing that, if authorized by a majority vote at any school meeting, the district board shall build schoolhouses, etc., and levy a tax, or issue bonds to pay therefor, subdivision 6, providing that the board, when authorized by a majority vote, may, to build a schoolhouse or to buy land for school purposes, issue negotiable warrants evidencing such debt, and levy a tax to pay interest or principal, and, under Section 2, providing that school districts may contract bonded indebtedness to erect a schoolhouse, purchase a site, or to fund outstanding indebtedness, subdivision 4 of the section providing that the board shall levy annually a direct *ad valorem* tax sufficient to pay interest accruing on bonds, where the notice of a special school meeting made no mention that a tax levy would be one of the purposes of the assemblage, but stated that the business would be to vote on the selection of a new schoolhouse site, and upon the question of authorizing the board of directors to borrow money to build a schoolhouse and purchase land for school purposes by negotiating interest-bearing warrants, etc., and where, upon authorization of the meeting, the land was purchased and a tax levied to meet the warrants issued in payment therefor, such tax was not without foundation, because the notice made no express mention that its levy would be one of the purposes of the meeting, since the authorization of the board to incur indebtedness was followed by operation of law by their right to levy a tax to discharge it.

Taxation—Collection—Restraint.

5. Plaintiffs, seeking to enjoin the collection of an illegal tax, who do not tender whatever may legally be due, have no standing in equity.

From Douglas: JAMES W. HAMILTON, Judge.

Department 1. Statement by MR. JUSTICE BURNETT.

This is a suit by Henry Landers for himself and on behalf of sixteen others similarly situated, and Ollie F. Castle against L. M. Van Aukin, T. G. Haven and — Weber, directors of school district No. 5, and James E. Sawyers, as county treasurer and tax collector of Douglas County, to enjoin said defendants from col-

lecting a tax or creating any indebtedness for the purpose of building a new schoolhouse or condemning land as a site for the same. It appears that the directors of school district No. 5 in Douglas County called a special meeting of the legal voters of that district and caused to be posted a notice of which the following is a copy:

"Notice is hereby given to the legal voters of school district No. 5 of Douglas County, State of Oregon, that a special school meeting of said district will be held at Green's schoolhouse on the 17th day of November, 1913, at 2 o'clock in the afternoon for the following objects: First, for the purpose of electing a school director to serve in the place of John Landers, resigned. Second, to vote upon the question of the selection of a new schoolhouse site. Third, to vote upon the question of authorizing the board of directors of this district in name and upon behalf of said district to contract a debt by borrowing money or otherwise not to exceed 5 per cent of the value of the taxable property of the district for the purpose of building a school building and for the purchase of land for school purposes and issue negotiable interest-bearing warrants and fix the time of payment of the same, of their district, evidencing such debt. Dated this 6th day of November, 1913."

It was signed by the chairman of the board and attested by the clerk. At the meeting thus called the chairman announced as an order of business the selection of a new schoolhouse site. Two nominations were made, the present site being designated as No. 1, and the southwest corner of Green Street and Pacific Highway as No. 2. The ballot resulted in No. 1 receiving 17 votes and No. 2, 30 votes. Quoting from the minutes of the meeting, it appears that:

"The chairman announced that, insomuch as there was not a two-thirds vote for either site, another ballot was ordered. The second resulted as follows: No. 1 received 4 votes; No. 2 received 29 votes. Mr. Van Aukin thereupon announced that site No. 2, having received the necessary two-thirds vote, was properly selected for the new schoolhouse site."

By a vote of 39 to 2 the resolution here set out was then adopted by the meeting:

"It is hereby resolved by the legal voters of school district No. 5, Douglas County, State of Oregon, in lawful meeting assembled upon the 17th day of November, 1913, at the schoolhouse in said district and at 3 o'clock in the afternoon of said day, that we authorize the board of directors of said school district No. 5 to contract a debt by borrowing money or otherwise in the sum of \$3,500 for the purpose of building a school building and for the purchase of land for school purposes, namely, a schoolhouse site, and issue negotiable interest-bearing warrants of said school district No. 5 evidencing such debt, and the time of the payment of the same is fixed at three years; also that the board of directors may from time to time, not oftener than once a year, levy a tax on the taxable property of said school district No. 5 to pay the interest upon said warrants evidencing such debt when due, and to pay the principal when due. That it is the intention of this meeting to proceed according to Section 114, School Laws of Oregon, 1913, compiled by J. A. Churchill."

The following allegations then appear in the complaint:

"That said defendants, the above-named board of school directors, by virtue of said pretended school meeting and said pretended election held on said seventeenth day of November, 1913, are threatening to, and unless restrained by order of this court will proceed to, condemn the land of plaintiff Ollie F. Castle, and will proceed to incur an indebtedness on the property of all

of the plaintiffs herein in the sum of \$3,500. That in pursuance of said resolution above set out herein the said defendants, board of directors of said district No. 5, attempted to levy a tax on all of the taxable property of said district and to incur an indebtedness against said district in the sum of \$3,500, which said tax was certified up by said defendants, board of directors of said district No. 5, to the assessor of Douglas County, State of Oregon, and by him extended on the tax-rolls of said county, and the same is now in the hands of the tax-collector for Douglas County, State of Oregon. That unless restrained by an order of this court the tax-collector will proceed to collect such tax out of the property of plaintiff, and that the same will be a lien on all of plaintiffs' property, to their irreparable injury and damage."

A demurrer to this complaint was sustained and the suit dismissed. The plaintiffs appeal. **AFFIRMED.**

For appellants there was a brief over the names of *Mr. George Neuner, Jr.*, and *Mr. Commodore S. Jackson*, with an oral argument by *Mr. Neuner, Jr.*

For respondents there was a brief and an oral argument by *Mr. George M. Brown*.

MR. JUSTICE BURNETT delivered the opinion of the court.

1. The following excerpts from Chapter 172, Laws of 1913, being "An act to provide for the duties and powers of district school boards, including their acts in connection with incurring indebtedness of their districts and funding and refunding the same," etc., are applicable to the case in hand:

"If authorized by a majority vote of the legal voters present at any legally called school meeting they shall purchase, lease or build schoolhouses, buy or lease

land for school purposes, furnish schoolhouses with furniture, lights, and apparatus, and for such purposes may, when so authorized, levy not oftener than once a year, a tax not exceeding 5 per cent of the value of the taxable property of the district, or issue or sell negotiable bonds as hereinafter in this act provided. They may also sell, lease, or otherwise dispose of any property belonging to the district, when authorized to do so by majority vote at any legally called school meeting: Provided, that the call for such meeting shall have stated that such sale, lease or disposition would be one of the objects of such meeting": Section 1, subd. 5.

"When authorized by a majority vote of the legal voters present at any legally called school meeting, they may, in the name and on behalf of their district, contract a debt by borrowing money, or otherwise, not to exceed 5 per centum of the value of the taxable property of the district, for the purpose of building a school building or repair of school buildings, or for the purchase of land for school purposes, and issue negotiable interest bearing warrants (and fix the time of payment of the same) of their district, evidencing such debt; and they may from time to time, not oftener than once a year, levy a tax on the taxable property of the district to pay the interest thereon, or principal when due, which taxes shall be collected in the same manner as other school taxes are or may be collectible by law. * * ": Section 1, subd. 6.

"Whenever, in the judgment of the board, it is desirable or necessary to the welfare of the schools in the district, or to provide for the children therein proper school privileges, or whenever petitioned so to do by one third of the voters of the district, the district board shall call a meeting, at some convenient time and place fixed by the board, to vote upon the question of the selection, purchase, exchange or sale of a schoolhouse site, or the erection, removal or sale of a schoolhouse. Said election shall be conducted and votes canvassed in the same manner as at the annual election of school officers. Three notices of the time, place and purpose of such meeting shall be posted in three public places

in the district by the clerk at least 10 days prior to such meeting. If a majority of the voters present at such meeting shall by vote select a schoolhouse site, or shall be in favor of the purchase, exchange or sale of the schoolhouse, as the case may be, the board shall locate, purchase, exchange or sell such site, or erect, remove or sell such schoolhouse, as the case may be, in accordance with such vote: Provided, that it shall require a vote of two thirds of the voters present and voting at such meeting to order the removal of the schoolhouse, and such schoolhouse so removed cannot again be removed within three years from the date of such meeting": Section 1, subd. 14.

In Section 2 of the act it is provided that school districts may contract bonded indebtedness for the purpose of erecting and furnishing a school building or buildings, or to purchase a site or sites therefor, or to fund or refund outstanding indebtedness, or for any, all, or either of such purposes, and to provide for the payment of the same by issuing bonds, when authorized by what is known as a "bonding election." Being empowered by a majority vote to that end, the directors are required to issue bonds, and the county treasurer must register them and cause their delivery to purchasers, holding the proceeds subject to the order of the district board, to be used solely for the purpose for which the bonds were issued. Subdivision 4 of Section 2 of the act contains this excerpt:

"The district school board shall ascertain and levy annually, in addition to all other taxes, a direct annual *ad valorem* tax on all the taxable property in such school district, sufficient to pay the interest accruing on said bonds promptly when and as the same becomes due."

Like mandatory language is used respecting the duty of the board to provide funds by taxation for the liqui-

dition of the bonds. It is further prescribed by the act that, if the district school board fail or refuse to levy the necessary tax or interest or sinking fund, the county treasurer shall report the same to the County Court and county board of commissioners, whose duty it then shall be to themselves levy the tax required. Subdivision 9 of Section 2 here follows:

“Whenever any school district shall have any outstanding warrant or bonded indebtedness incurred in building any schoolhouse or schoolhouses or in the furnishing of the same or for the purchase of any schoolhouse site or sites or in refunding or funding indebtedness, which indebtedness is due or subject under the pleasure or option of the school district to be paid or redeemed, it shall be lawful for said school district, by and through its district school board, to issue and exchange, for any such indebtedness, its bonds bearing not to exceed legal interest per annum; and said bonds shall in all respects conform to and be governed as to their issue by the provisions of Section 2 of this act except that the funding or refunding of said indebtedness and the issuing of bonds for such purpose shall not require an election, but may be done by resolution of the district school board at any legally called meeting thereof; and the validity of any bonds issued under the provisions of this section or of the indebtedness thereby funded or refunded shall not thereafter be open to contest by said school district or by any person or corporation for or on its behalf for any reason whatever.”

As the law stood at the time of the events narrated in the complaint, Section 4088, L. O. L., read thus:

“District meetings, legally called, shall have power to levy a tax upon all real and personal property in their district and make any necessary appropriation for the support and benefit of schools, and also adjourn from time to time: Provided, that no tax shall be levied at any special meeting unless the call for such meet-

ing shall have stated that one of the purposes of such meeting would be the levying of a tax. The minutes of all school meetings must be signed by the chairman and secretary."

The plaintiffs question the regularity of the proceedings described, and argue that they constituted an attempt to order the removal of the schoolhouse, requiring for its accomplishment a two-thirds vote of the voters present. They urge also that, one vote having been taken, in which the proposed new site failed of receiving two thirds of the ballots, the power to vote on the question was exhausted, and no sanction can be imputed to the second ballot. The plaintiff's discussion of the issue proceeds upon the theory that but one schoolhouse can be had in a school district, and that any proposal to build another on a different site is an attempt to remove "the schoolhouse," requiring the greater majority mentioned. Our attention has not been directed to any statute restricting any school district to a single schoolhouse. On the contrary, we learn from subdivision 5 of Section 1 of the act in question that the board may be authorized to lease or build schoolhouses, in the plural. In subdivision 13 it is made the duty of all boards of directors to provide certain conveniences "for each of the schools under their charge," for which the board may levy a tax without a vote of the taxpayers.

The removal of a schoolhouse is not the only contingency provided for in subdivision 14 of that section under which the proceedings in question appear to have been taken. The board is authorized in that part of the law to call a meeting to vote, not only upon the removal of a schoolhouse, but also for the selection, purchase, exchange, or sale of a schoolhouse site, or the

erection of a building. Of all these things, only the removal of a schoolhouse requires a two-thirds vote. It was competent for the district by a majority vote to authorize the erection of a new schoolhouse. The removal of the old one was not involved, and a two-thirds vote was not required. We attach no importance to the second ballot, and hold that the majority vote disclosed by the first ballot was sufficient for any purpose indicated by the notice of the meeting.

2. Concerning the opposition to the condemnation of land, it is enough to say that the owner of the site which may be condemned has an ample and sufficient remedy at law by which she may resist the attempt to take her property, for it is hornbook law that in a complaint involving the exercise of eminent domain the one attempting to acquire the property of another through that prerogative must, as a condition precedent, show the authority for so doing. So, in this case, if the proceedings described fail to confer authority upon the district to exercise the right to condemn, the question could be raised by the defendant in the condemnation action. Having this plain, speedy and adequate remedy at law, the plaintiff Ollie F. Castle has no standing in this court of equity to invoke the extraordinary remedy of injunction.

3, 4. The other question about the validity of the tax which it is said the defendants have levied and are attempting to collect presents more difficulties. It is argued that, because the notice of the special meeting in question makes no express mention that a levy of a tax would be one of the purposes of the assemblage, the proposed exaction is utterly without foundation. The notice, in almost the exact words of the statute, announces the intention of voting upon the question of

authorizing the board to contract a debt for the purpose of building the schoolhouse by negotiating interest-bearing warrants. Clearly the right to incur the indebtedness on that basis is amply foreshadowed by the terms of the notice. The question to be determined is whether the right of the directors to levy a tax followed by operation of law upon their being authorized to incur the indebtedness. It is a well-settled principle that a remedial statute should be so construed as to give it practical effect according to the intention of the lawmakers. It would greatly impair the availability of the interest-bearing securities of school districts if a construction should be placed upon this statute whereby indebtedness might be incurred without present authority to provide for its payment. The uncertain future action of popular assemblies like a district school meeting, the personnel of which is variable, and might be different at each succeeding annual convocation, is not a sound asset upon which to borrow money. The credit of a school district ought not to rest upon such a fluctuating basis for indebtedness lawfully and beneficially incurred, unless by a fair construction of the statute there is no escape from such conclusion. It is contemplated by the terms of the act under discussion that a district may either pay cash for the equipment of schoolhouses, use interest-bearing warrants, or issue bonds. For the purpose of cash payments, subdivision 5 of Section 1 empowers the board, when directed by a majority vote of the legal voters, to build schoolhouses, among other things, and repeats the language, "when so authorized," in directing a levy to be made not oftener than once a year. On the other hand, the succeeding subdivision, treating of the issuance of negotiable interest-bearing warrants,

requires their negotiation to be sanctioned by a majority vote of the legal voters; but, still speaking of power of the board of directors, the statute omits in the very next clause the words "authorized by a majority vote of the legal voters," and uses this language:

"And they may from time to time, not oftener than once a year, levy a tax," etc.

When we consider this in connection with subdivision 9 of Section 2, which commissions the board of directors, without an election, but simply by its own resolution, to issue bonds in discharge of any outstanding warrant or bonded indebtedness, we are led to the conclusion that the liberty conferred upon the board to issue interest-bearing warrants necessarily carried with it *ex vi termini* the power to levy a tax for the payment of the same without any other vote or election. It would be idle to say that a debt might be incurred, but that no authority should exist to provide funds for its payment. If it were the intention of subdivision 6 to withhold from the directors the power to levy a tax in payment of the warrants issued for the purpose named, unless they were expressly authorized at each meeting of the electors to levy a tax, the board could easily evade that restriction by turning the indebtedness into the form of bonds under subdivision 9 of section 2, thus incurring the mandatory duty under subdivision 4 of levying the tax necessary to pay the bonded obligation.

It seems to be a fair and reasonable construction of the statute to say that, when notice is given that a vote will be taken upon the question of authorizing the board to contract a debt by borrowing money upon interest-bearing warrants, it follows by operation of law that the voters are thereby notified that, in case

such securities are issued, the duty of the board to itself levy the tax necessary to pay them follows as a matter of course. We see no good reason to doubt the validity of the indebtedness evidenced by the warrants described, or to question the authority of the board of directors to levy a tax for the payment of the same.

5. It is not directly stated in the complaint whether the directors have levied a single tax for the full amount of the indebtedness in one levy, or only for the interest. In any event, there is some tax legally due to be applied on the warrants mentioned, either for the interest or principal or both. The plaintiffs do not tender anything whatever on this account, and hence under such authorities as *Welch v. City of Astoria*, 26 Or. 89 (37 Pac. 66), and *Dayton v. Multnomah County*, 34 Or. 239 (55 Pac. 23), they have no standing to invoke relief in equity.

The decree of the Circuit Court is affirmed.

AFFIRMED.

MR. CHIEF JUSTICE MOORE, MR. JUSTICE BENSON and
MR. JUSTICE HARRIS CONCUR.

Argued September 8, affirmed September 21, 1915.

STATE v. LOCKE.*

(151 Pac. 717.)

Bigamy—Lascivious Cohabitation—Statutes—"Polygamy."

1. Section 2073, L. O. L., declaring guilty of "polygamy" a person who, having a former husband or wife living, shall marry another, or live and cohabit with another as husband or wife, and providing a punishment, which may be imprisonment in the penitentiary, is not repealed and supplanted by Section 2075, providing punishment, as a misdemeanor, if any man and woman, not being married to each other, shall lewdly or lasciviously cohabit or associate together; the second section not defining the same offense as the first, but proof being required under the first not required under the second.

[As to what constitutes bigamy, see note in 93 Am. Dec. 252.]

Indictment and Information—Allegations—Place of Offense.

2. An indictment charging that defendant, in the county of L. then and there being, and having a wife living in P., then and there cohabited with another woman as his wife, charges the commission of the crime in L., and not in P.

Witnesses—Competent—Wife—Bigamy.

3. Section 1535, L. O. L., as amended by Laws of 1913, page 351, providing that in prosecutions for polygamy the wife of accused shall be a competent witness, and may testify against him, and without his consent, as to the fact of marriage, does not limit her testimony to the marriage ceremony.

[As to proof of former marriage in prosecutions for bigamy, see notes in 47 Am. St. Rep. 228; 106 Am. St. Rep. 768.]

Criminal Law—Reception of Evidence—Scope of Objections.

4. The objection of defendant in polygamy to his wife testifying, except to the fact of marriage, is not sufficient to raise the objection of the generality of her subsequent testimony that she is married to him.

Criminal Law—Documents in Other State—Authenticating Copies.

5. The certification of a copy of the record of a marriage license and certificate in a county of another state, by the clerk of the Circuit Court of such county, under the seal of the court, to be correct copies of such instruments as they appear of record, with the appended certificate of the judge thereof that the copy was made and issued

*As to husband or wife as witness against the other in prosecution for bigamy, see note in 2 L. E. A. (N. S.) 862.

As to presumption of validity of former marriage in prosecution for bigamy, see note in 9 L. E. A. (N. S.) 1036.

For admissibility of judgment in civil action as proof of, former marriage on trial for bigamy, see note in 26 L. E. A. (N. S.) 464.

in due form, and that the certifying officer was the clerk, and the person having the legal custody of the original, being in compliance with Section 766, subdivision 7, L. O. L., relating to proof of documents in a sister state, renders the evidence competent.

Criminal Law—Documents in Other State—Authenticating Copies.

6. Any necessity of proof of the statute of another state authorizing such a record, before a certified copy of the record of a marriage license and certificate therein can be introduced, is satisfied by the statement of the judge in his appended certificate that the certifying clerk was the legal custodian of the original.

Names—Presumption—Identity of Person.

7. Identity of the name of defendant in polygamy with the name in a marriage certificate introduced in evidence primarily connects him with the marriage, under Section 799, subdivision 25, L. O. L., giving as a disputable presumption identity of person from identity of name.

Bigamy—Presumption—Validity of Former Marriage.

8. The presumption is generally in favor of the validity of a former marriage, absent evidence to the contrary.

Criminal Law—Admission—Marriage—Divorce Decree.

9. Introduction by defendant in polygamy of a copy of a decree of divorce, of him from another is an admission of his having been married to such person.

Courts—Record—Failure to Show Jurisdiction.

10. A decree of a court of general jurisdiction setting aside its decree of divorce, being presumed to have been rightfully given, is admissible, though it does not show that notice of the application to open the decree was served; lack of jurisdiction neither appearing on its face nor being shown.

Criminal Law—Evidence Admissible by Reason of Other Evidence.

11. Defendant in polygamy having introduced a decree of divorce, the state may introduce one setting it aside, though incidentally it shows his unfairness in obtaining his decree by stealth.

Bigamy—Former Marriage—Evidence.

12. Evidence on a prosecution for polygamy *held* sufficient to prove a valid former marriage of defendant.

Bigamy—Cohabiting—Evidence.

13. Evidence on a prosecution for polygamy *held* sufficient to authorize a finding of defendant, having a wife, living and cohabiting with another as his wife.

From Lane: LAWRENCE T. HARRIS, Judge.

Department 2. Statement by MR. JUSTICE BEAN.

On October 23, 1914, John A. Locke, the defendant, was indicted for the crime of polygamy.

The charging part of the indictment is as follows:

"That the above-named John A. Locke, defendant, on the 25th day of March, A. D. 1914, in the county of Lane, State of Oregon, then and there being, and having a wife then living, to wit: One Jessie A. Locke, who was then and who had been for a long time previous thereto living in Portland, Oregon, did then and there, and while she, the said Jessie A. Locke, was still the wife of him, the said John A. Locke, wrongfully, unlawfully and feloniously live and cohabit with another woman, to wit: With one Nellie Gilmore as the wife of him the said John A. Locke, contrary to the statutes," etc.

A trial was had before a jury, resulting in a verdict and judgment of conviction. Defendant appeals.

AFFIRMED.

For appellant there was a brief with oral arguments by *Mr. M. Vernon Parsons* and *Mr. Ralph A. Watson*.

For the State there was a brief over the names of *Mr. Joseph M. Devers*, District Attorney, and *Mr. J. F. Brumbaugh*, with an oral argument by *Mr. Devers*.

MR. JUSTICE BEAN delivered the opinion of the court.

1. It is the position of counsel for defendant that Section 2073, L. O. L., which inhibits polygamy in the following language, to wit:

"If any person having a former husband or wife living shall marry another person, or live and cohabit with another person as husband or wife, such person shall be deemed guilty of polygamy."

—was repealed by Section 2075, L. O. L. The former section directs a punishment by imprisonment in the penitentiary or county jail or by fine. The latter section provides for a punishment as a misdemeanor:

“If any man and woman, not being married to each other, shall lewdly or lasciviously cohabit or associate together.”

Both sections were enacted in 1864. It is argued that the latter numbered section defines the same act as is defined in the former. The fact that the offense described in Section 2075 might contain some of the elements of the crime defined in Section 2073 does not warrant the conclusion that the latter is supplanted by the former. The intent of Section 2073 is to preserve the sanctity of the marriage relation. Polygamous relations are a crime not included in the provisions of Section 2075. To prove an infraction of the statute against polygamy would require different evidence than that required in a case of lewd or lascivious cohabitation: *State v. Donahue*, 75 Or. 409 (144 Pac. 755). The contention of defendant's counsel cannot be upheld in this respect. Both statutes have stood the test since 1864. The statute prohibiting bigamy in this state has not been repealed.

2. It is next submitted on behalf of defendant that the indictment does not charge any offense in Lane County, but that, if any offense is charged, it is an offense in Portland. With this claim we cannot agree. A reading of the accusation is sufficient to inform defendant that he is charged in the usual language with the commission of a crime in Lane County. *State v. Durphy*, 43 Or. 79, 82 (71 Pac. 63), relied upon by defendant's counsel, is not in point.

3, 4. Upon the trial, Mrs. Jessie Locke, the wife of defendant, was called as a witness for the state. Counsel for defendant objected to this witness testifying, except as to the fact of the marriage. The court

sustained this objection. The witness then testified as follows:

"Q. State whether or not you are married to the defendant.

"A. Yes.

"Q. When?

"A. The 2d of November, 1897.

"Q. Where?

"A. Economy, Indiana, Wayne County."

All other evidence of this witness was excluded. Counsel for defendant now insists that the admission of the answer to the question quoted above was error; that the same came within the objection and ruling. No additional specific objections to the question or motion to strike out the evidence was made. Section 1535, L. O. L., as amended by Laws of Oregon of 1913, page 351, provides *inter alia*:

"That in all criminal actions for polygamy or adultery, the husband or wife of the accused, shall be a competent witness, and shall be allowed to testify against the other, and without the consent of the other, as to the fact of marriage."

It is the claim of defendant that the wife could only testify as to the marriage ceremony. The point is not well taken. The objection of counsel was not specific enough to direct the mind of the trial court to the objection now contended for. The evidence introduced is permitted by the statute. The question raised is only one of phraseology. If the general statement of the witness as to the fact of marriage was unsatisfactory to defendant, it should have been challenged by cross-examination or otherwise. There was no error in this respect.

5-8. The state, over objection and exception of defendant's counsel, introduced in evidence a certified

copy of the record of a marriage license and certificate, in Wayne County, Indiana. It is maintained by defendant's counsel that the copy was not properly certified and that it was not connected with defendant. The documents are certified by the clerk of the Circuit Court of Wayne County, Indiana, under the seal of the court, to be correct copies of the marriage license and certificate of marriage of John A. Locke to Jessie A. McCall, on November 2, 1897, as the same appear of record. There is appended the certificate of the judge of that court to the effect that the certified copy of the marriage certificate was made and issued in due form and that the certifying officer was the clerk and the person having the legal custody of the original certificate. This is a compliance with subdivision 7 of Section 766, L. O. L., relating to proof of documents in a sister state, and rendered the evidence competent. The claim of defendant that the state should prove the statute of Indiana authorizing such record is satisfied by the statement of the judge of that state that the clerk was the legal custodian of the original. The evidence of the wife connects the defendant with the marriage on the date named in the marriage certificate. His name is identical with the name contained therein primarily leaving no room for mistake: Section 799, subd. 25, L. O. L. The presumption is generally in favor of the validity of a former marriage when there is no evidence to the contrary: 5 Cyc. 699.

9-11. The defendant introduced in evidence a copy of a decree of divorce of defendant from Jessie A. Locke, rendered by the Circuit Court for Clackamas County, May 11, 1914. This was an admission on the part of defendant that he had been married to the person named, and amply supplemented the other evidence

of marriage. In rebuttal the state offered in evidence a decree of the Circuit Court for Clackamas County, dated November 21, 1914, setting aside the decree of divorce of May 11th, for the reason that the affidavit for publication of summons was false and fraudulent; that the defendant's wife was within the state at the time, to affiant's knowledge; that Mrs. Locke had no notice or knowledge of the decree; and permitting her to answer. Defendant's counsel objected to the latter decree, upon the ground that it was prejudicial, and that the same did not show notice of the application to open up the decree was served upon the plaintiff in the divorce case, who is the defendant here, and saved an exception to its introduction, and also moved to strike the same out. Section 103, L. O. L., confers the power upon the court, in its discretion, at any time within one year after notice thereof, to relieve a party from a judgment, order or proceeding taken against him through his mistake, inadvertence, surprise or excusable neglect. A proceeding under this section is a direct proceeding, and the presumption is in favor of the validity of the decree: *Crabill v. Crabill*, 22 Or. 590 (30 Pac. 320); 14 Cyc. 722; *Evans v. Evans*, 60 Or. 195 (118 Pac. 177). There is no lack of jurisdiction of the court appearing on the face of the record introduced in evidence, and nothing to the contrary was shown.

"The judgment of a court of general jurisdiction is always presumed to have been rightly given, and its jurisdiction to have attached fully until the contrary is shown": 23 Cyc. 682.

There are exceptions, as where it is shown that the party to be served is a nonresident of the state: *Knapp v. Wallace*, 50 Or. 348 (92 Pac. 1054, 126 Am. St. Rep.

742). Neither of the decrees referred to notes the manner of service or the appearance of either party or attorney. The judgment-roll was not introduced by either party, and the record in this case is not in a condition to raise the question of service of process. The status of the marriage of John A. Locke and Jessie A. Locke was a matter of inquiry in the case, and when the defendant introduced the decree of May 11th the state was entitled to show the true condition of the decree, notwithstanding that the decree of November 21st incidentally showed unfairness on the part of defendant in obtaining the decree by stealth. The whole matter was connected with the marital relation of defendant and Jessie A. Locke, and evidently linked together in the mind of defendant for the purpose of terminating the offense, and formed a part of the same transaction: *State v. Baker*, 23 Or. 442 (32 Pac. 161); *Shaffner v. Commonwealth*, 72 Pa. 60 (13 Am. Rep. 649); Underhill, Criminal Evidence, §§ 87, 88.

It developed upon the trial that the defendant was a conductor on a railroad train which ran between Portland and Eugene, having a wife living in Portland at the time it is alleged he cohabited with another woman as his wife in Eugene, and while so doing he obtained a decree of divorce in another county upon publication of summons as though his wife were a nonresident of the state. We do not discuss this matter at great length, for the reason that the trial court in the charge to the jury considered the decree of divorce as not void, but voidable only, and instructed the jury that it was a complete defense for all acts of the defendant committed on or after May 11, 1914, and that they should consider only the acts of defendant committed prior to that date. This was as favorable to the defendant

as he had reason to ask, and practically nullified the effect of the November decree.

12, 13. At the close of the state's case, and also after all the evidence was introduced, counsel for defendant moved for a directed verdict of acquittal, and assigns as error the refusal to grant the same. Two main points are relied upon: (1) That the state failed to prove a valid former marriage of defendant to Jessie A. Locke; (2) that the state failed to prove that defendant had sexual intercourse with Nellie Gilmore prior to May 11, 1914. As to the former question we have alluded to a portion of the evidence. In addition to the direct evidence of the marriage given by Jessie A. Locke, and proof of the record of the license and marriage certificate, proof of subsequent cohabitation as husband and wife and the rearing of children was produced. Not only that; the defendant, by obtaining the divorce, admitted the marriage: See 5 Cyc. 700. Upon this point there was ample evidence for the jury. There was evidence by the state tending to show that defendant and Nellie Gilmore, during March and April, 1914, in Eugene, engaged and occupied two rooms furnished for light housekeeping, with one bed; that defendant lived and cohabited there with Miss Gilmore when not on or at the other end of his run on the railroad. The circumstances tended strongly to show that they cohabited as man and wife, occupied the same bed, and had sexual intercourse. Defendant represented generally that the woman was his wife. At the end of April they engaged and occupied other similar rooms in the same manner. There was evidence from which the jury might believe beyond a reasonable doubt that defendant, while having a wife living, lived and cohabited with another woman as husband and wife, in

violation of the statute. There was no error in denying the request for a directed verdict of acquittal.

As we find no error in the record, the judgment of the lower court is affirmed. AFFIRMED.

MR. CHIEF JUSTICE MOORE, MR. JUSTICE BENSON and MR. JUSTICE EAKIN concur.

Argued September 15, affirmed September 28, 1915.

BOLIN v. WALTERS.

(151 Pac. 716.)

Account—Evidence—Sufficiency.

1. In a suit for an accounting between plaintiff and defendant for commissions received from the sale of real estate, evidence held to show that the transaction between the parties was ended and that defendant had accounted.

[As to what are mutual accounts, see note in *Ann. Cas.* 1913D, 816.]

From Multnomah: THOMAS J. CLEETON, Judge.

This is a suit by F. C. Bolin against R. F. Walters. From a decree in favor of defendant, plaintiff appeals. The facts are set forth in the opinion of the court.

AFFIRMED.

For appellant there was a brief and an oral argument by *Mr. W. L. Cooper*.

For respondent there was a brief over the names of *Messrs. Bauer & Greene* and *Mr. A. H. McCurtain*, with an oral argument by *Mr. Thomas G. Greene*.

Department 2. MR. JUSTICE BEAN delivered the opinion of the court.

1. This controversy arose out of substantially the following facts: Defendant Walters was a real estate

broker, doing the principal part of his business in the name of the O. W. P. Land Company. Plaintiff, Bolin, was a timberman, and had sold a large tract of timber, adjoining that in regard to which the dispute arose, to parties represented by one N. R. Smith, who signified to him that they desired to purchase a quarter section of timber at \$1.50 per 1,000 feet, and requested him to find the owner. Bolin informed Walters of the prospective purchaser, on condition that he would divide the commission or profits with him. On February 23, 1910, a 30-day option to purchase the land was obtained by the defendant in the name of his wife, H. G. Walters, in consideration of \$200 paid by the latter. The purchase price named was \$17,100, to be paid within 40 days from the time of election to purchase. Beall, the owner of the timber land, resided in Virginia, and Mr. E. H. Peery, an attorney, of Portland, acted as his agent. Afterward plaintiff and defendant entered into a contract, which Bolin asserts to be as follows:

“In consideration of \$100 to me paid by F. C. Bolin, I agree to give to the said F. C. Bolin one half of the net returns received by me from the sale of the south $\frac{1}{2}$ of north $\frac{1}{2}$ of section 22, township 4 south, range 5 east. It being expressly understood that all expenses in connection with the said sale, including all commissions due to other parties, must first be paid out of the moneys received by me. The final remainder to be divided equally between us.

“[Signed] R. F. WALTERS.”

Bolin claims he did not see the option, nor know it was in the name of Mrs. Walters. He paid Walters \$100 on account of the deal. Defendant claims that the contract with Bolin was made by the O. W. P. Land Company, and provided that, if a sale of the land was

made to N. R. Smith, the commission should be divided with plaintiff. Under date of February 28, 1910, he made an entry in the daybook of the company as follows:

"Received from F. C. Bolin \$100 to apply on office expense of sale of Beall timber to N. R. Smith, he to get one half of office commission."

On February 26th an agreement of purchase and sale of the land was executed between Mrs. H. G. Walters and N. R. Smith. The price was \$22,000, of which \$2,000 was deposited in the bank for the purpose of payment. The balance was to be paid as soon as title was found satisfactory to the purchaser; it being understood that there was a tax title to adjust, and a suit pending to determine the title, to be settled within a reasonable time. On account of litigation Beall could not give title as provided in the option until the fall of 1913: See *Beall v. Beall*, 67 Or. 33 (128 Pac. 835, 135 Pac. 185). The time of the option was extended twice, and up to April 9, 1910. When it developed that there would be a long delay in securing title on account of the legal proceedings, Walters says he talked with Bolin in regard to the probability of having to purchase the land and pay or become responsible for the payment of \$17,100 before the land could be sold. In view of the dispute as to what the contract with Bolin actually was, it is well to note how the parties regarded the matter at that time. Walters testified:

That when they talked it over, he told Bolin that they did not feel like taking the responsibility of agreeing to buy that piece of property. "I asked him [Bolin] if he could join with us in any way, and what he thought he could do." That Bolin said: "I couldn't do anything just now. * * Now, you do just what you

think is best in the matter. If you think well to take it up, I am pretty sure you can sell that piece of property; that Smith will complete the deal," but not to do anything on his say-so.

Mrs. Walters consulted with an attorney, and during the life of the option served notice that she elected to purchase under the terms thereof. Thus she became obligated to purchase the land, whether the sale to Smith was consummated or not. Bolin states that Walters asked him to what extent he could help financially in taking up the option, and he answered:

"I told him I guessed we could take care of it. He said he didn't want to go into that. He was not a timberman, and didn't know anything about it, and said: 'I suppose, if Mr. Smith wouldn't have taken this up, I would never have went into it.' I says: 'Mr. Walters, we can't hold Mr. Smith here for two or three years. If he don't want to take this up, when he is ready, he has a right to draw his money, and if we don't take care of it we will have to lose our \$100 apiece.' "

He further testified:

"If I was not able to myself, I had a man to take the timber."

Mrs. Walters states that she placed the sale of the land under the control of the O. W. P. Land Company, of which her husband was president; that the commission was to be \$1,000.

The lawsuit of the Bealls having been terminated, a sale of the land was made to parties represented by Mr. Smith about October, 1913, for \$22,000. Walters managed the sale through the O. W. P. Land Company, with the assistance of others: Bolin not desiring to be known in the transaction. Upon Bolin's return from the East, he and Walters took up the matter of

dividing the commission. Bolin states that Walters said:

"I have been through quite a little bit of expense, and I think I ought to have a little more out of it than you had."

Walters claims that a commission of \$1,000 was paid to another party to assist in making the sale. After figuring out some other expenses, Walters paid Bolin by check \$403.50 out of the \$1,000 received as the commission of the O. W. P. Land Company, taking the following receipt:

"Nov. 8, 1913.

"Received from O. W. P. Land Company the sum of \$403.50 as my share in the commission from the sale of J. W. Beall timber tract in section 22, township 4 South range 5 East, Clackamas County, Oregon.

"F. C. BOLIN."

At the time of this transaction Bolin states that he told Walters that:

"You would never have got on to this deal if I hadn't put you on to it, and you got \$5,000 there."

It therefore appears that at the time of the settlement Bolin knew that a profit had been realized by someone when he accepted Walters' check. At that time Mr. Walters asked Bolin for the contract in regard to the commission, and two or three days afterward Bolin surrendered the same to Walters, who destroyed it; hence the controversy as to its contents. The negotiations for the sale of the land were pending for so long a time, and there were so many complications attached, that a misunderstanding very naturally arose between the participants. Defendant claims that there was a mutual settlement of the whole transaction. Whatever the exact wording of the contract may

have been, it seems that plaintiff expected to realize a portion of the commission. His version of the matter of purchasing the land under the option indicates that all he desired to do was to furnish a purchaser; that he did not wish to purchase the land on speculation. The trial court found in effect that the transaction between plaintiff and defendant was fully settled. The plaintiff does not in his complaint charge any fraud in the premises. We think that he has wholly failed to show that he is entitled to a further accounting by the defendant.

The decree of the lower court was right, and is affirmed.

AFFIRMED.

MR. CHIEF JUSTICE MOORE, MR. JUSTICE EAKIN and MR. JUSTICE HARRIS CONCUR.

Submitted on briefs September 17, modified September 28, 1915.

BENO v. NORRIS.

(151 Pac. 731.)

Appeal and Error—Findings in Equity—Harmless Error.

1. In an equity case, the failure of the trial court to file findings of fact and conclusions of law does not constitute reversible error.

Quieting Title—Vendor and Purchaser—Rights of Vendor—Nonperformance.

2. Where a purchaser of land in installments agreed to convey to the vendor a house and lot in satisfaction of one of the installments, but the conveyance was not made, the vendor is entitled to a rescission of the contract, and to its cancellation as a cloud on his title.

Estoppel—Equitable Estoppel—What Constitutes.

3. In a suit by a vendor to cancel a vendee's contract, the vendor held estopped to assert his rights as against purchasers of part of the parcel contracted to be sold; such purchasers having entered into the agreement in reliance on the vendor's representations.

[As to estoppel *in pais* as question of law or fact, see note in Ann. Cas. 1913A, 1072.]

Estoppel—Equitable Estoppel—Defenses.

4. Where a vendor assured purchasers of part of the parcel from the vendee that they were safe in buying, such purchasers were not estopped, though they did not investigate the county records to ascertain what title their vendor and his grantor had.

From Jackson: ROBERT G. MORROW, Judge.

In Banc. Statement by MR. JUSTICE BENSON.

This is a suit by Victor E. Beno against T. C. Norris, Nettie B. Norris and B. H. Harris. The facts are as follows:

On February 4, 1908, plaintiff entered into a contract with E. E. Miner and wife for the purchase of a tract of land in Jackson County, containing 206 acres. The contract was in the form of a bond for a deed, and states as the consideration certain payments to be made at stated times, aggregating the sum of \$7,500. This instrument was properly acknowledged, and thereafter duly recorded in the office of the county recorder. On March 22, 1910, plaintiff assigned this instrument to defendant B. H. Harris for a consideration of \$10,730, of which \$2,000 was paid on the same day. The last of these payments was to have been made on September 22, 1910, and was for the sum of \$6,000. Some time after the assignment, Harris entered into an arrangement with plaintiff whereby the former agreed to convey to the latter a certain house and lot in Medford, which plaintiff agreed to accept in lieu of such last payment. The title to this property was in the name of the minor children of Harris, of whom he was the guardian, and he represented to Beno that there would be no difficulty in securing an order of the probate court for the transfer. Thereupon plaintiff surrendered possession of the farm to Harris and occupied the Medford residence. Shortly thereafter Harris entered

into negotiations with the defendants Norris concerning the exchange of their Medford residence for 20 acres of the farm. This exchange was finally made on April 9, 1910, Harris receiving a deed to the Norris property, and at the same time giving them a warranty deed to the 20-acre tract, of which they took immediate possession. The latter conveyance contained the following clause: "This deed is subject to a mortgage now held by one E. E. Miner." Harris failed to secure an order from the probate court for the transfer of his children's property to plaintiff, and never made any of the deferred payments, as agreed in the assignment of the bond for a deed, and finally abandoned the venture entirely and left the state, being last heard from at Colon, in Panama. The defendants Norris occupied the 20-acre tract in controversy from April 1910, until September, 1911, when plaintiff served them with notice to quit the premises, which they did. Thereafter, in December, 1913, plaintiff began this suit to quiet title to the entire farm, alleging that he is in possession and the equitable owner thereof, and that defendants claim some adverse interest therein, calling upon them to declare their interest, and praying that his title be quieted as against each of them. The defendant Harris, being served with summons by publication, made default. The defendants Norris answered jointly, wherein, after some denials, they pleaded affirmatively the exchange of their residence property in Medford for a 20-acre portion of the land described in the complaint, and then by way of estoppel allege in substance, among other things, that while negotiations were pending between them and Harris for the exchange mentioned they went to plaintiff and told him of the proposed exchange, and asked him if it would be

all right and proper for them to make the trade; that plaintiff, in reply, told them it was all right; that he had owned the land in question, but had sold it to Harris, and advised them to close the deal; that, relying upon plaintiff's statements, they concluded the transaction as above set out. Plaintiff filed a reply, wherein, after a general denial, he sets up affirmatively the bond for a deed from Miner, the assignment thereof to Harris, the default of Harris as to payments, the retaking of possession by himself, and alleges that, instead of telling defendants that it was all right to deal with Harris, he warned them that neither he nor Harris could give them a conveyance, as the legal title was still in the Miners. A trial was had, and the lower court, without making any findings of fact or conclusions of law, entered a decree quieting title to the 20-acre tract in the defendants Norris, and adjudging that none of the parties should recover costs. Plaintiff appeals.

Submitted on briefs without argument, under the proviso of Supreme Court Rule 18: 56 Or. 622 (117 Pac. xi).

MODIFIED.

For appellant there was a brief by *Mr. W. E. Phipps*.

For respondent there was a brief submitted by *Mr. H. A. Canaday*.

MR. JUSTICE BENSON delivered the opinion of the court.

1. Plaintiff's first assignment of error challenges the validity of the decree, because no findings of fact or conclusions of law were filed by the trial court. There is no merit, however, in this contention, for this court has repeatedly held that such omission does not con-

stitute reversible error. In the case of *Sutherlin v. Bloomer*, 50 Or. 398 (93 Pac. 135), we read:

“The next point to which our attention has been directed is that the court below made no finding of fact, and it is urged that this duty is made imperative by our Code. B. & C. Comp., Section 406, provides that the court, in rendering its decision in suits in equity, shall set out in writing its findings of fact on all material issues presented by the pleadings, together with its conclusions of law, each of which shall be stated separately from the decree and be filed with the clerk, thereafter constituting a part of the judgment-roll of such cause, and that the findings of fact shall have the same force and effect as a verdict of a jury in actions at law. These provisions are followed by an exception and qualification thereof, to the effect that on appeal the cause shall be tried anew without reference to such findings. Under this exception, it is clear that a failure to make findings should not constitute reversible error; nor can we conceive of any reason why it should have such effect, when all the evidence offered and properly admitted is before the appellate court.”

2. We then consider plaintiff's fifth assignment, which is that the court erred in not granting him the relief prayed for as against the defendant Harris. We think that the decree of the trial court should have given plaintiff the relief sought as against Harris.

3. The remaining assignments may well be considered together, since they are all directed to the question of Norris' plea of estoppel. This was their sole defense. The evidence upon this point is in direct conflict. Mrs. Norris testifies thus:

“I went to the place. Mr. Beno was on the place at the time, and I went down there and asked him about it, and he told me that he had sold it to Mr. Harris, this property, the land there, and that he thought it would be all right for us to make the trade, and to trade Mr.

Harris our property in Medford, my property in Medford, for the land. That part of the land that I was to get a deed for, that he had owned that, that he had sold it to Mr. Harris."

Again, in answer to another question, she says:

"Mr. Beno understood I was to get a deed from Mr. Harris, and he told me it was all right."

Upon cross-examination she testifies as follows:

"Q. Now, do you tell the court that you went to Mr. Beno and had a talk with him before you made this deal?

"A. Yes, sir; I do.

"Q. And who was present at that time?

"A. Mr. Beno and Mr. Beno's wife. Mrs. Beno, Mr. Norris, and I were present.

"Q. You went there and asked Mr. Beno whether or not you should trade for this?

"A. I went there and told Mr. Beno I was about to trade for this. We talked about it, and Mr. Beno knew I was trading my property in Medford for this 20 acres, and he told me that it was all right, and that the piece of property I was getting was a good piece of property, and that it would be better for us there than in Medford, and gave me encouragement."

Mr. Norris, in answer to questions, testified thus:

"Well, some time before the trade I went out with Mr. Harris to look the property over, and I come across Mr. Beno—met Mr. Beno up in the field, and talked to him about it, and asked him how about it, what kind of property it was; and he recommended it as being all right. He said he had sold it to Mr. Harris, and it would be a very good trade. He said it would be an excellent trade for us on account of our family, Mr. Beno said; and he said he thought we would do well in making the change and getting our children out on a ranch. And then at another time, that was when I took Mrs. Norris down with me, we went down and saw

Mr. and Mrs. Beno, as Mrs. Norris would not trade on Mr. Harris' word, to find out whether Mr. Harris actually owned the property or not, and there was an abstract in consideration, Mr. Harris told me, and which I supposed there was; so Mrs. Norris says, 'We will go down and see Mr. Beno'; and we did, and Mr. Beno said it would be all right, and for the both of us to make the deal; he thought it was a good deal for Mr. Harris to take the property—that he had sold it to him, that it was Mr. Harris' property then, and Mr. Harris had more money than he knew what to do with, and said several things like that, in order to get us to understand it was all right for us to make the deal."

In reference to the conversation testified to by Mrs. Norris, the plaintiff testifies as follows:

"Q. State whether or not that is true, as Mrs. Norris testifies, that she came to yourself to make inquiry about this property before the trade for it.

"A. Not that I know of.

"Q. Do you remember of her ever coming there and making any inquiry about it before that time?

"A. No, sir; I don't remember it.

"Q. Well, if she had done so, do you think you would remember it?

"A. I think I would; yes."

Referring to the other conversation testified to by Mr. Norris, he speaks thus:

"Q. Now, Mr. Norris testifies here that you induced him, or attempted to induce him, to trade the property off for this. Now, is that a fact; did you?

"A. I never did anything of the kind; no, sir."

Upon cross-examination, plaintiff unqualifiedly denies both conversations, and says that the first knowledge he ever had of the transaction came to him when Norris told him that he had a deed to the 20 acres, and that he then told Norris that his deed was worthless. There was, of course, other evidence bearing indirectly upon

this question; but the only portion which appears to have persuasive force is the following testimony given by the plaintiff on cross-examination:

“Q. When you found out they had moved on to your place there, and as you said had no title to it, why was it you waited for two years before you asked them to move off, until September, 1911, when they moved in there the spring of 1910; why did you wait for two years to ask them to move off, if you knew?

“A. I was living in the Harris house; I was waiting to get a settlement from Harris. I had possession of the Harris house.”

We therefore conclude that a preponderance of the evidence sustains defendants' contention that the conversation did take place, and that plaintiff himself was so perfectly satisfied that Harris would make good that, at the time of the exchange between Harris and the Norrises, Beno honestly regarded it as a safe transaction.

4. Plaintiff's contention that Norris was negligent in not going to the county records for his information is not maintainable, for, while Harris at the time had no record title, he had an equitable interest, which was subject to bargain and sale, and defendants had a right to rely upon the statements of Beno.

The trial court did not err in entering a decree in favor of the defendants Norris. A decree will therefore be entered in favor of the defendants T. C. Norris and Nettie B. Norris, quieting title in them to the 20-acre tract, as described in their answer, and giving plaintiff the relief prayed for in his complaint as against the defendant Harris, with a judgment for costs against the latter. Neither of the parties before us to recover costs in this court.

MODIFIED.

Argued September 17, affirmed September 28, 1915.

FITZHUGH v. NIRSCHL.*

(151 Pac. 735.)

Exceptions, Bill of—Bystanders' Bill—"Disinterested Witness."

1. Under Section 170, L. O. L., declaring that if an objection is made to any ruling, and the truth of the statement thereof is not agreed upon between counsel and the court, counsel may verify his statement on his own oath and that of two disinterested witnesses, the brother of a party to the action is not a "disinterested witness" competent to verify counsel's oath.

Exceptions, Bill of—Bystanders' Bill—Mode of Preparing.

2. Section 170, L. O. L., relating to bystanders' bills of exceptions, and providing that affidavits of counsel and disinterested witnesses shall be taken before the clerk, and his certificate attached, is mandatory, and where not so taken the bill cannot be considered.

Fraud—Diseased Animals—Sale—Measure of Damages.

3. In an action for damages to a herd of cattle, which the buyer claimed were sold when infected with a disease, where there was no evidence that animals, other than those which died, were affected, the buyer's measure of damages was the value of the dead cattle, which should be computed as if they had been in a good condition.

[As to actions to recover for false representations, see note in 18 Am. St. Rep. 555.]

Appeal and Error—Review—Harmless Error.

4. The erroneous refusal to give an instruction on the measure of damages is harmless, where the jury found that plaintiff was not entitled to recover anything.

Fraud—Diseased Animals—Damages—Complaint—Restrictions.

5. Where a buyer's complaint averred that the cattle sold were infected with a disease known as "black-leg," no recovery for damages sustained from other diseases can be had; the complaint having limited the issues.

Fraud—Fraudulent Concealment.

6. Where a seller of animals, knowing that they have a latent disease, which affects their value, of which the buyer is ignorant, conceals it, he is liable for damages.

*As to damages recoverable for fraud and deceit in selling diseased animals, see note in 34 L. E. A. (N. S.) 697. REPORTER.

From Lane: LAWRENCE T. HARRIS, Judge.

Department 2. Statement by MR. JUSTICE McBRIDE.

This is an action by John R. Fitzhugh against Andrew Nirschl to recover damages because of fraudulent concealment by defendant of the fact that certain cattle sold by him to plaintiff were diseased.

The complaint alleged that in the latter part of the year 1913 he purchased from defendant a herd of cattle for the purpose of stocking a ranch in Lane County, which purpose was well known to defendant; that at the time of the purchase of said cattle they were afflicted with an infectious disease commonly known as the "black-leg," and defendant then knew said cattle were so infected, and that plaintiff did not know that fact; that by reason of the premises the plaintiff has been damaged in the sum of \$500.

The defendant answered, admitting that he sold plaintiff a herd of cattle as alleged, but denied generally all the other allegations of the complaint. The plaintiff introduced evidence tending to show that within two weeks after he bought the cattle one of them died, that within three weeks after the purchase two more died, and that he found three more dead a short time afterward. A veterinary surgeon pronounced the disease of which they died "black-leg." Evidence was introduced tending to show that defendant had lost some cattle before the sale, and that he had been told that the symptoms attending their death indicated black-leg; but defendant contradicted this testimony. There was also evidence introduced tending to show the value of the animals of plaintiff which died of the disease, but no evidence that others of the herd had been sick or infected, or of the value of the remaining animals, or of any depreciation in their value. There was a general verdict for defend-

ant, and plaintiff appeals, alleging as error: (1) The ruling of the court excluding the evidence of witness John H. Perkins; and (2) in refusing to give instructions Nos. 1, 2 and 3 requested by plaintiff. Said instructions are as follows:

“(1) The measure of damages which the plaintiff is entitled to recover in this case, if you find that he is entitled to recover damages, will be the excess, if any, of what the cattle would have been worth, had they been sound and free from any infection, over their value at the time of their purchase; or, in other words, if you allow the plaintiff damages, you shall allow him the difference between the value of the cattle as infected and what their value would have been if they had been sound and free from infection.

“(2) In the complaint the plaintiff avers that the cattle were infected with a disease commonly known as ‘black-leg’; but if you find that the cattle were infected with any disease, of which the defendant had knowledge, you shall allow the plaintiff such damages as he has suffered according to the measure of damages last stated, or, in other words, if you find that the cattle were infected with any disease, and the defendant knew that the cattle were infected with some disease, it makes no difference as to whether or not the defendant knew the name of the disease, or what kind of a disease it was, the measure of damage would be as last stated.

“(3) If the defendant’s cattle were infected with any kind of a disease, or if they had been so infected within a recent time, it was his duty to tell plaintiff about it; and if he failed to do so he wronged the plaintiff, and must answer to the plaintiff in damages to the amount that the plaintiff has suffered on account of the diseased cattle, according to the measure of damages already stated to you.”

AFFIRMED.

For appellant there was a brief and an oral argument by *Mr. H. E. Slattery*.

For respondent there was a brief over the name of *Messrs. Foster & Hamilton*, with an oral argument by *Mr. R. S. Hamilton*.

MR. JUSTICE MCBRIDE delivered the opinion of the court.

1. It appears from the record that the stenographer's notes showed no exception to the ruling of the court excluding the testimony of the witness Perkins, and that the court refused to certify that any exception was taken. Therefore plaintiff, in order to bring himself within the provisions of Section 170, L. O. L., presented to the court the affidavits of himself, I. W. Fitzhugh, Carl Hopkins and H. E. Slattery, his attorney, as to the fact of the exception, and presented the same to the court. None of these affidavits were taken before the clerk, and it appears by an affidavit filed in the case that I. W. Fitzhugh, one of plaintiff's affiants, is a brother of plaintiff. Section 170, L. O. L., requires counsel to verify his statement of the proposed exception by his own oath and that of two respectable and disinterested persons, or by his own oath and that of the stenographer. The concluding clause of the section is as follows:

"All affidavits of said persons shall be taken by the clerk of the court, who must certify thereon, if he is satisfied of the fact that the person is respectable and disinterested."

The brother of the affiant was not a disinterested person, within the meaning and intent of this section: *Lovering v. Lamson*, 50 Me. 334; *Lyon v. Hamor*, 73

Me. 56; *Blodget v. Brinsmaid*, 9 Vt. 27; *Hasceig v. Tripp*, 20 Mich. 216.

2. The statute requiring the affidavits to be taken before the clerk and his certificate to be attached thereto is mandatory. It is the only means by which the appellate court can appraise the character of the witnesses, and a disregard of this provision is fatal to this assignment of error.

3, 4. Instead of the first instruction asked by plaintiff's counsel the court gave the following as to the measure of damages:

"If you find that the plaintiff is entitled to a verdict against the defendant, then the next question you will have to decide will be: How much is the plaintiff entitled to? There has been some evidence offered in the trial of the case which the plaintiff claims tends to show that some of the cattle which he procured from the defendant died after the transfer. The plaintiff would be entitled to recover from the defendant the reasonable value of the cattle that died, estimating the reasonable value of those cattle at what they would have been worth had they not been infected by the infectious disease, as claimed by the plaintiff. In other words, you would be required to estimate the value of the cattle that died, assuming that they did not have any infectious disease, and whatever was the reasonable market value of those cattle, assuming that they were not affected with an infectious disease, would be the amount that the plaintiff would be entitled to recover from the defendant. I am referring now to the cattle that died. There is no evidence in this case at all that would warrant you in assessing any damages against the defendant on account of any cattle that are still alive. The only evidence that has been offered on the trial of the case with reference to the question of damages is merely with reference to the cattle that have died since the transfer of the cattle from the defendant to the plaintiff."

This instruction, in view of the testimony given by plaintiff, stated the correct measure of damages. There was no testimony whatever that any other cattle than those which had died had been infected or suffered any injury, or as to any depreciation in value from any cause, and any attempt by the jury to assess damages on account of depreciation in value would have been a mere guess. If the jury had accepted the testimony of plaintiff and his witnesses as true, they would have been compelled under the instruction to have found in favor of plaintiff for the value of the cattle which plaintiff's evidence showed had died as a result of the alleged infection. Their failure to do so showed that they found either that the cattle did not die of black-leg, or that defendant was innocent of any deceit or fraudulent concealment; so, in any event, plaintiff was not injured by the refusal of the court to give the requested instruction.

5, 6. The other two instructions requested were faulty, because by giving them the court would have allowed plaintiff to recover for an injury different from that specified in his complaint. The object of pleading is to apprise a party of the nature of the injury which it is claimed he has committed, so that he may know with reasonable certainty how to prepare his defense. Perhaps it was not necessary for plaintiff to have been absolutely specific as to the disease which he claims destroyed his cattle. If he knew, it was his duty so to state. If he was ignorant of its exact nature, he could have stated that fact; but, having been absolutely specific, he should be confined to the disease specified. A man cannot sue his neighbor for willfully or negligently giving him the smallpox, and recover upon proof that he gave him the itch. Having limited his damage in this case to a specific

disease, the defendant had a right to assume that proof of the existence of such disease would be the matter relied upon by plaintiff at the trial, and therefore prepare himself to meet that issue, and show that no such disease existed in his herd, and would be misled if, upon the trial, he was required to rebut proof of some disease not mentioned in the pleadings.

"If plaintiff avers negligence in general terms, without specifying wherein it consists, his declaration, petition or complaint will be good on general demurrer, though under some systems it will be subject to a motion to make it more definite and certain. But where he avers that the negligence of defendant consisted in one thing, and then proves negligence consisting in something else, he ought not be allowed to recover. 'It would be folly to require the plaintiff to state his cause of action and the defendant disclose his grounds of defense, if in the trial either or both might abandon such grounds and recover upon others which are substantially different from those alleged'": 6 Thompson, Neg., § 7471.

"If an allegation be made in a pleading which embodies matter of essential description of that which is material to the cause of action or ground of defense, or operates as a limitation, of that which is material, the evidence must correspond to such allegations; else a variance will be created, and the action cannot be maintained without an amendment of the pleadings": 13 Ency. of Ev. 633.

Here, to say the least, the specific description constitutes a limitation on that which is material. Counsel for plaintiff cite the case of *Grigsby v. Stapleton*, 94 Mo. 423 (7 S. W. 421), which was an action to recover the price of certain cattle, in which the defendant, among other defenses, pleaded: (1) A fraudulent representation as to the health and condition of the cattle; and (2) fraudulent concealment of the fact that

they had Spanish or Texas fever. In this case Justice BLACK uses the following language:

“If, therefore, plaintiff knew they [cattle] had the Texas fever, or any other disease materially affecting their value upon the market, and did not disclose the same to the defendant, he was guilty of a fraudulent concealment of a latent defect. It is not necessary to this defense that there should be any warranty or representations as to health or condition of the cattle. Indeed, so far as this case is concerned, if the cattle had been pronounced by some of the cattlemen to have the Texas fever, and, after knowledge of that report came to plaintiff, some of them to his knowledge died from sickness, then he should have disclosed these facts to the defendant. They were circumstances materially affecting the value of the cattle for the purposes for which they were bought, or for any other purpose. * * To withhold these circumstances was a deceit, in the absence of proof that defendant possessed such information.”

The pleadings are not given, beyond what we have heretofore stated, and the language used must be considered with reference to the case then before the court. The opinion states that it was shown beyond any question that the cattle had the Texas fever. Therefore, so far as appears, there was nothing in the case suggesting the question raised in the case at bar. The court was considering a case where the disease alleged had been absolutely proved; there being no question as to the relevancy of testimony to the allegations of the complaint. The court properly laid down a general rule which is correct, namely, that if animals have any latent disease which affects their value, and the seller knows this fact and fails to disclose it to a buyer, who does not know of its existence, the seller is guilty of a fraudulent concealment and

liable accordingly. So in this case, if the cattle sold by defendant had any latent disease whatever materially affecting their value, the existence of which he knew and of which plaintiff was ignorant, it was his duty to have disclosed it; but before plaintiff can compel him to respond in damages for a breach of such duty he must allege the facts constituting it in such a way as not to mislead the defendant into preparing to defend against a particular and specific breach, and then ask the court at the close of the trial to instruct that plaintiff may recover upon any breach whether alleged or not.

We find no error in the record, and the judgment is affirmed.

AFFIRMED.

MR. CHIEF JUSTICE MOORE, MR. JUSTICE EAKIN and MR. JUSTICE BEAN concur.

Argued September 20, dismissed October 5, 1915.

STATE EX REL. v. EASTMAN.

(151 Pac. 967.)

Contempt—Violation of Decree—Clerk's Affidavit in Third Person—Statute.

1. Under Section 829, L. O. L., providing that in all affidavits and depositions the witness must be made to speak in the first person, where a clerk of court deposed in the third person that defendant had failed to obey an order of the court respecting the payment of alimony, such affidavit was insufficient to confer jurisdiction on the court to make an order adjudging defendant in contempt, since the test of the sufficiency of an affidavit is whether a charge of perjury could be based on it, and it would be a good defense to such a prosecution to show that the paper was not, in contemplation of law, an affidavit.

[As to power of courts to create and enforce liens to secure the payment of alimony, see note in 102 Am. St. Rep. 700.]

From Columbia: JAMES A. EAKIN, Judge.

Department 1. Statement by MR. JUSTICE MCBRIDE.

This was an appeal from an order of the Circuit Court of Columbia County adjudging defendant in contempt for disobedience to an order of the court made in certain divorce proceedings which required defendant, A. R. Eastman, to pay to the clerk of the court for the support of relator, Mary Eastman, and her minor children the sum of \$20 per month. The contempt proceedings were initiated by the following affidavit filed by the clerk of the court:

“H. E. La Barre, being first duly sworn, upon oath deposes and says: That, for more than two years last past, he has been, and now is, the duly elected, qualified, and acting county clerk of Columbia County, State of Oregon, and ex-officio clerk of the Circuit Court of the State of Oregon, for Columbia County. That on the 28th day of October, 1912, the following order was made and duly entered, to wit:

“ ‘In the Circuit Court of the State of Oregon for Columbia County.

“ ‘Arthur R. Eastman, Plaintiff, v. Mary Eastman, Defendant.

“ ‘On this 28th day of October, 1912, this matter is before the court on the application of the defendant Mary Eastman, to change the decree heretofore made herein in respect to the amount the plaintiff was to pay toward the support of defendant and the minor children, and the defendant appearing in person and by her attorney, Jas. P. Stapleton, and the plaintiff appearing in person and by his attorney, W. E. Critchlow, and all things being in readiness, the taking of testimony was proceeded with, witnesses being called upon both sides, and at the conclusion of the testimony, the court, being fully advised in the premises and being familiar with the law of the case, does order, adjudge and decree, and this does order, adjudge and decree that said decree heretofore made on the 30th day of March, 1912, ordering plaintiff to

pay \$10 per month into court for support of defendant and the minor children, be and the same is hereby changed and altered in this, that it is hereby ordered and decreed that the plaintiff Arthur R. Eastman, be and is hereby ordered and directed, between the 1st and 10th of each month, beginning with November, 1912, to pay into the hands of the clerk of this court for the use of defendant Mary Eastman and the minor children named in the said first decree the sum of \$20, and that said sum be paid monthly until the further order of this court.

“ ‘Done in open court, October 28, 1912.

“ ‘J. A. EAKIN,

“ ‘Judge.’

“That said Arthur R. Eastman has failed and neglected to obey the order so made, and has failed and neglected to make any of the payments as ordered to be made, and has failed and neglected to pay into my hands as clerk of said court any of the payments ordered to be made, or any sum of money at all for the use of the defendant Mary Eastman, and the minor children, as by the said order he was directed to do.

H. E. LA BARRE,

“County Clerk.

“Subscribed and sworn to before me this 6th day of October, 1913.

W. A. HARRIS,

“County Judge.”

Thereupon the defendant appeared and filed a counter-affidavit, which not being sufficient in the judgment of the court to purge him of the alleged contempt, the court overruled his offer to introduce testimony and imposed upon him a fine of \$50, with the alternative of imprisonment for 25 days, from which judgment he appeals.

DISMISSED.

For appellant there was a brief and an oral argument by *Mr. W. E. Critchlow*.

No appearance for respondent except a brief submitted by *Mr. W. A. Harris*.

MR. JUSTICE MCBRIDE delivered the opinion of the court.

The affidavit upon which the order to show cause was based was insufficient to confer jurisdiction upon the court to make the order. It is in the third person, and Section 829, L. O. L., provides: "In all affidavits and depositions, the witness must be made to speak in the first person." The true test of the sufficiency of an affidavit is whether or not a charge of perjury could be based upon it: 1 R. C. L. 773; *Miller v. Munson*, 34 Wis. 579 (17 Am. Rep. 461). It is obvious that it would be a good defense to a prosecution for perjury for making a false affidavit to show that the paper in question was not in legal contemplation an affidavit but something else. Proceedings of this character are *quasi* criminal, and the defendant is entitled to demand a substantial compliance with the statute before a penalty can be imposed which may result in his imprisonment.

The proceeding is dismissed.

DISMISSED.

MR. CHIEF JUSTICE MOORE, MR. JUSTICE BURNETT and MR. JUSTICE BENSON concur.

Argued September 20, modified October 5, 1915.

HELD v. KENNEDY.

(151 Pac. 968.)

Exchange of Property—Realty—Rescission of Contract—False Representations.

1. Where plaintiff and defendant exchanged realty, and defendant falsely represented to plaintiff, who told him that he was ignorant of soils and their qualities, that the land which he was to receive was not white land and would not require drainage, the contrary being the fact, but plaintiff being ignorant thereof, plaintiff could rescind such contract for false representations.

[As to the difference between an exchange and a sale of property, see note in 94 Am. St. Rep. 227.]

From Multnomah: HENRY E. MCGINN, Judge.

Department 1. Statement by MR. JUSTICE BENSON.

This is a suit by George C. Held against J. B. Kennedy and Ralph Ackley to rescind a contract whereby plaintiff and defendant Kennedy exchanged certain real properties. Plaintiff's property consisted of a dwelling-house and lot in Albina, and defendant's property was a 32-acre tract of farm land near Woodburn in Marion County. The complaint alleges that plaintiff's Albina property was worth \$5,000; that the tract of farm land for which he exchanged is what is known as "white land," unproductive, and of little or no value for agricultural purposes; that he was induced to trade by reason of the positive assurance given him by defendant that there was no white land on the tract, that it had ample natural drainage, and that no artificial drainage was necessary; and that these representations were false. There were a number of other allegations charging that defendant also made false representations as to the probable value of crops which might in the future be grown upon the

land; but, since we regard these as mere "puffing," they are of no importance in the consideration of the case. The answer denies the allegations of fraud and denies that plaintiff relied upon any such representations. From a decree in favor of plaintiff, this appeal is brought.

MODIFIED.

For appellant there was a brief over the names of *Mr. John M. Pipes* and *Mr. George A. Pipes*, with an oral argument by *Mr. John M. Pipes*.

For respondent there was a brief and an oral argument by *Mr. Wilson T. Hume*.

MR. JUSTICE BENSON delivered the opinion of the court.

1. There is but one question involved in the consideration of the case thus presented: Did the defendant make false representations to plaintiff as to the character of the soil in the 32-acre tract of land which were relied upon by him to his injury, and was plaintiff ignorant of the truth? If so, then the decree of the trial court should be affirmed.

It would serve no good purpose to set out in detail the evidence submitted. The plaintiff and his wife testify that they visited the tract of land owned by defendant, who accompanied them; that plaintiff told him that he was ignorant of soils and its qualities; that he knew nothing of soils or drainage; that he had been informed that the land in the vicinity was largely composed of what is known as white land; that defendant assured him that "there was not an inch of white land in the tract"; that plaintiff then asked defendant for details in regard to drainage; that the latter assured him that the land was drained efficiently

by natural drainage and that no artificial drainage was required. The defendant testifies that he never was asked these questions by plaintiff, but admits that the latter said to him "that they had told him that it was all white land out there," and that he had replied, "People out there are liable to tell you anything." Thereafter, in answer to the question by the court, "Is it white land?" he answered, "Not all of it," and added, "I don't think more than an acre or an acre and a half is what you would call lowland on it." In reference to the question of drainage, the defendant testifies that he pointed out the ditches to plaintiff and told him that if he kept them open he would have no trouble on that score. It will be seen that there is a distinct conflict in the testimony upon these vital questions. The evidence shows that white land is not desirable and without good drainage is practically valueless. While there is a like conflict as to the value of the land in question, we are reminded forcibly of the fact that the trial court saw the several witnesses upon the stand and had an opportunity to estimate their credibility, which we have not. We conclude that the trial court did not err in its decree, except in giving to plaintiff a judgment for punitive damages. There is nothing in the pleadings or the evidence to justify such judgment: *Sullivan v. Oregon R. & N. Co.*, 12 Or. 392 (7 Pac. 508, 53 Am. Rep. 364).

The decree of the lower court is therefore affirmed, except as to the punitive damages, which are eliminated; neither party to recover costs in this court.

MODIFIED.

MR. CHIEF JUSTICE MOORE, MR. JUSTICE MCBRIDE
and MR. JUSTICE BURNETT CONCUR.

Motion to dismiss appeal denied September 28, 1915.
Second motion to dismiss appeal allowed without an opinion October 7, 1915.

FISHER v. PORTLAND RY., L. & P. CO.

(151 Pac. 735.)

Judgment—Rendition—Time.

1. Notwithstanding Section 201, L. O. L., declaring that, if trial is by jury, judgment shall be given by the court in conformity to verdict, and so entered on the day on which it was returned, the court may, where judgment was not entered according to its order, render judgment a little over a month later, and then grant the unsuccessful party a new trial, for the statute is not mandatory, and the delay was not so unreasonable as to deprive the court of jurisdiction.

[As to collateral attack upon judgment for loss of jurisdiction occurring *pendente lite*, see note in 17 Am. St. Rep. 143.]

From Multnomah: HENRY E. MCGINN, Judge.

This is an action by Roy Fisher, a minor, by Andrew J. Crafton, his guardian *ad litem*, against the Portland Railway, Light & Power Company, a corporation. From an order granting plaintiff a new trial, defendant appeals. Respondent files motion to dismiss appeal.

MOTION DENIED.

Mr. Ernest R. Ringo and Mr. Maurice W. Seitz, for the motion.

Mr. F. J. Lonergan and Messrs. Griffith, Leiter & Allen, contra.

In Banc. MR. JUSTICE EAKIN delivered the opinion of the court.

1. This is a motion to dismiss the appeal. The record that the judgment was appealed from is as follows:

The journal of the court below, on April 14, 1915, showed this:

“We, the jury, duly impaneled to try the above-entitled cause, find our verdict for the defendant.”

—which was signed by Charles H. Thompson, as foreman, and by 11 other of the aforesaid jurors. After the aforesaid verdict was read, the court, upon its own motion, entered an order setting the aforesaid verdict aside and remanding the above-entitled cause for a new trial. On May 20th, following the same judge made this order, which was entered on the journal:

“This matter coming on to be heard, and it appearing to the court that heretofore, and on the 14th day of April, 1915, after a trial had been had in the above-entitled cause before a jury and this court, a verdict was returned in favor of the defendant above named and against the plaintiff above named; and it further appearing to the court that after said verdict had been received and read on said 14th day of April, 1915, the court did then and there order that said verdict be filed, and that judgment be rendered and entered upon said verdict, and the court did then and there, of its own motion, make a further order that said judgment so rendered and entered upon said verdict be set aside, and that plaintiff have a new trial in said cause; and it further appearing to the court that, through inadvertence and mistake, judgment was never rendered or entered upon said verdict as ordered by the court, and the court being fully advised in the premises, it is hereby ordered that judgment be and the same is hereby rendered and entered upon said verdict in favor of the defendant and against the plaintiff herein, and that the defendant have and recover of and from the plaintiff its costs and disbursements incurred herein, taxed at \$ —, and that this order be entered *nunc pro tunc* as and of the 14th day of April, 1915; and after the verdict and judgment was entered the court of its own motion ordered that the judgment, and the verdict

upon which the judgment was predicated, was against all the evidence in the case, and that there was no evidence to support it, be and the same is hereby set aside, and the defendant take nothing thereby, and that a new trial of this case is ordered."

Counsel move to dismiss, for the reason that the court had no jurisdiction to make this last order, and that, the judgment being void, there could be no appeal. This contention is based upon his construction of the orders above. It will be seen that there was no order of judgment entered when the verdict was received. The argument is that, under Section 201, L. O. L., if judgment is not entered on the verdict the day it is received, the court loses jurisdiction to render a judgment afterward. While there is a seeming contradiction, in that at first the court says that he did then and there order a judgment to be entered on the verdict, and afterward states that no judgment was rendered or entered, we think a fair construction of the order is that the court did find that a judgment was ordered on the verdict at the time it was received; otherwise, there would be no meaning to the order. If such order was made at that time, then even counsel admit the finding of the judgment given May 20th; but the court did not lose jurisdiction by failure to enter judgment on the rendition of the verdict. This question was before this court in *Skelton v. Newberg*, 76 Or. 126 (148 Pac. 53), where it was held, Mr. Chief Justice MOORE writing the opinion, after a close review of the subject:

"We conclude, therefore, that Section 201, L. O. L., as amended, is not mandatory, and that the delay of 24 days in giving and entering the judgment after the verdict was returned was not so unreasonable as to deprive the court of power to determine the matter."

In the case at bar the time was a few days longer between the receipt of the verdict and the giving of the order *nunc pro tunc*; but it was not unreasonable.

The motion to dismiss is therefore denied.

MOTION DENIED.

SECOND MOTION TO DISMISS ALLOWED.

Argued September 22, reversed October 13, 1915.

MILLER v. FISHER.

(151 Pac. 971.)

Abatement and Revival—Enjoining Action at Law—Grounds of Demurrer—Action Pending.

1. Demurrer, in an equity bill to stay proceedings at law, on the ground that there is another action on the same subject matter between the same parties pending, should be overruled; the pendency of the law action being a prerequisite in such case to the filing of the bill.

Injunction—Remedy at Law—Cancellation of Instruments.

2. In ejectment, the defendant alleged that he could not succeed unless a certain plat of lands was canceled. He therefore brought a bill in equity to stay proceedings at law, and prayed cancellation of the plat. Demurrer was filed to his bill on the ground that it did not state a cause of action. *Held*, that the demurrer should have been overruled, since the defendant did not have a plain, adequate and complete remedy at law.

[As to cancellation of instruments notwithstanding a defense at law, see note in 9 Am. St. Rep. 859.]

Municipal Corporations—Plats by Land Owners—Mistake—Recordation—Cancellation.

3. Where the plat of city lots is filed, but the lots are sold according to another unrecorded plat by conveyances which do not conflict, and the two plats do not coincide, the original and recorded plat should be canceled to protect titles acquired under the second plat.

Appeal and Error—Presumptions—Defect of Parties—Failure to Demur.

4. Where no demurrer is interposed alleging defect in parties, it will be assumed that there are no other parties in interest.

From Multnomah: WILLIAM N. GATENS, Judge.

Department 1. Statement by MR. CHIEF JUSTICE MOORE.

This is a suit by B. H. Miller and Edith E. Miller against Julius Fisher, Harry Fisher, Augusta Fisher and Mary Fisher, to enjoin the maintenance of an action at law. The facts disclosed by the complaint in equity, which is in the nature of a cross-bill, are to the effect that James Steel and his wife, being the owners of a tract of land, in Multnomah County, Oregon, described as beginning at a point 52 rods east of the southwest corner of the southeast quarter of section 16, in township 1 north of range 1 east, giving courses and distances to the place of beginning, caused such land to be surveyed into lots, blocks, streets, etc., and September 9, 1882, filed a plat thereof entitled "Park Addition to Albina," which map failed to designate the initial point or any other tie. Block 2 as delineated on the plat is represented as being separated from the south boundary of section 16 by Division Street, 30 feet in width. The lots in this block are 50 feet wide from north to south and 100 feet long from east to west, and along the west side are consecutively numbered from 1 to 12 beginning at the south end of the block, and along the east side are consecutively numbered from 13 to 24, commencing at the north end of the block. The owners of the platted land on December 7, 1882, executed a deed for lot 17 in that block to Mrs. N. J. Woodruff, from whom the plaintiff B. H. Miller obtained a conveyance thereof. Steel and wife on November 30, 1883, executed a deed for lots 20 and 21 in such block to Mrs. Anna A. Fisher, from whom her heirs, the defendants, Julius Fisher, Harry Fisher, Augusta Fisher and Mary Fisher obtained the title by inheritance. The owners of the addition on May 19,

1884, conveyed lot 16 in that block to George Johnson, from whom, by mesne conveyances, the plaintiff Edith E. Miller, wife of the coplaintiff, secured a conveyance thereof. Steel and wife, on December 17, 1887, filed another plat of "Park Addition to Albina," correctly designating the initial point; but in the latter map the lots on the east side of block 2 are numbered from 13 to 24, consecutively, beginning at the south end of the block instead of the north as in the original plat. By making sketches of block 2 as originally and subsequently platted, it will be seen at a glance that the lots which were at first marked 20 and 21 become 17 and 16, respectively.

The defendants in the case at bar, as plaintiffs, commenced an action in ejectment against the plaintiffs herein, as defendants, alleging that they were the owners in fee of lots 20 and 21 in block 2 in Park Addition to Albina, according to the plat thereof, filed September 9, 1882; that such plat had been changed, as indicated, without the consent, knowledge or authority of Anna A. Fisher, the then owner of such lots at the time the alteration in the plat was made; and that the defendants in such action, the plaintiffs in this suit, wrongfully withhold the possession of the lots last described to the damages of the plaintiffs in that action in the sum of \$900. The defendants in such action answered, and thereupon filed the complaint first mentioned herein, setting forth, in substance, the facts here stated, and alleging in effect that the conveyances so made by Steel and wife to Mrs. Woodruff, Mrs. Fisher and George Johnson, and all subsequent conveyances of lots thus described, were executed for lands as indicated on the plat filed December 17, 1887; that, at the time such conveyances were made, each purchaser of

the several lots accepted the title thereto in accordance with the corrected map, believing that the original plat was a correct copy thereof, and as soon as it was discovered that a mistake had been made the corrected plat was filed, which latter map has always been considered the correct plat of Park Addition to Albina, now the City of Portland, but by oversight or mistake the original map has never been set aside except by filing the corrected plat; that, for more than 30 years prior to the commencement of this suit, the plaintiffs herein and their grantors have been the owners in fee and in the possession of lots 16 and 17 in block 2 of such addition, as appears on the corrected plat, and have at all times paid the taxes levied and the assessments imposed on such premises; and that they have no plain, speedy or adequate remedy at law.

For a further cause of suit and by way of estoppel, it is alleged that during her lifetime Mrs. Fisher admitted she was the owner of lots 20 and 21 in block 2 of Park Addition to Albina, according to the corrected plat thereof, and she and her successors in interest have paid the taxes and assessments thereon; that Mrs. Fisher never asserted any claim to lots 16 and 17 in such block, nor did her successors in interest do so until they instituted their action in ejectment; and that defendants herein as heirs of Mrs. Fisher should be estopped from claiming any estate in or right to lots 20 and 21 in block 2 as represented on the incomplete plat of Park Addition to Albina, filed September 9, 1882.

The prayer is that the maintenance of the ejectment action be perpetually enjoined; that the defendants herein be restrained from asserting any claim to or right in lots 16 and 17 in block 2, as represented by the

corrected plat; that the original map be declared void for uncertainty; that the plaintiffs in this suit be decreed to be the owners in fee of the lots last mentioned, as represented on the plat filed December 17, 1887, and for such other and further relief as to the court may seem just and equitable in the premises.

A demurrer to such complaint, on the grounds that it did not state facts sufficient to constitute a cause of suit, and that there was then another action pending between the same parties, involving the same subject matter, was sustained, and, the plaintiffs herein declining further to plead, the suit was dismissed, and they appeal.

REVERSED AND REMANDED.

For appellants there was a brief and an oral argument by *Mr. Edward T. Taggart*.

For respondents there was a brief over the names of *Messrs. Manning & White* and *Mr. C. J. Wangerein*, with an oral argument by *Mr. Samuel White*.

Opinion by MR. CHIEF JUSTICE MOORE.

1. The second ground of the demurrer is without merit, for the statute declares that:

“In an action at law, where the defendant is entitled to relief, arising out of facts requiring the interposition of a court of equity, and material to his defense, he may, upon filing his answer therein, also as plaintiff, file a complaint in equity, in the nature of a cross-bill, which shall stay the proceedings at law, and the case thereafter shall proceed as in a suit in equity, in which said proceedings may be perpetually enjoined by final decree, or allowed to proceed in accordance with such final decree: Section 390, L. O. L.

In Oregon, though a court at law and one in equity are presided over by the same judge, they are essentially distinct forums, and in order to authorize the consideration of a purely equitable question, or to warrant a review of facts that tend to overthrow the plaintiff's legal title, or to give the defendant a better right by reason of his superior equity, when he is without a plain, adequate and complete remedy at law, such facts may be presented to the court in the manner provided in the section of the statute from which the excerpt has been taken: *Moore v. Frazer*, 15 Or. 635 (16 Pac. 869); *Dose v. Beatie*, 62 Or. 308 (123 Pac. 383, 125 Pac. 277). A complaint, in equity, in the nature of a cross-bill, cannot be interposed to enjoin the prosecution of an action at law until such action has been instituted and an answer filed therein; and, this being so, there must always be pending an action between the same parties in which the facts stated in the complaint must necessarily be somewhat analogous to the averments of the cross-bill.

2. Considering the other ground of demurrer, it is possible, the plaintiffs herein, as defendants in the ejectment action, could, by their answer, have set forth facts and by proof established a valid title to the demanded premises, and thus have defeated a recovery; but in such action the original plat could not have been canceled, and hence that which might have been alleged, as a reason why the plaintiffs therein should not have recovered what they sought, did not afford a plain, adequate and complete remedy at law: *Wood v. Fisk*, 45 Or. 276 (77 Pac. 128, 738).

3. If, in negotiating sales of land in Park Addition to Albina, Mr. Steel or his agents pointed out to purchasers the stakes set in the ground to indicate par-

ticular lots, which were not conveyed to others, and such purchasers accepted deeds thereto and entered into possession of the premises, making valuable improvements thereon, their titles should be protected without regard to the earlier plat. When the second map was made is not disclosed by the cross-bill but if it was in existence at the time the conveyances referred to herein were executed, and such sales of lots were made in accordance with the amended plat, though it had not been filed, and the real property described in the deeds so given did not interfere or conflict with prior conveyances, the original plat should be canceled.

4. Since no demurrer was interposed to the cross-bill on account of a defect of parties, it must be assumed that lots 16, 17, 20 and 21 in block 2 of Park Addition to Albina were the only tracts in controversy, and the parties to this suit the only individuals who would be interested in or affected by a cancellation of the original plat.

It is believed that the complaint herein stated facts sufficient to constitute a cause of suit, thereby requiring the defendants to set forth by answer the facts composing their defense, and for this reason an error was committed in sustaining the demurrer and dismissing the suit.

The decree is therefore reversed, and the cause remanded for such further proceedings as may be necessary not inconsistent with this opinion.

REVERSED AND REMANDED.

MR. JUSTICE BENSON, MR. JUSTICE BURNETT and MR. JUSTICE MCBRIDE concur.

Argued September 23, modified October 13, 1915.

HOWELL v. HOWELL.

(152 Pac. 217.)

Trusts—Resulting Trust—Evidence—Sufficiency.

1. In an action involving title to land, evidence *held* insufficient to show a resulting trust in favor of the defendant; it appearing that her payments of money for the title to the land had been lost because title was in another than the person to whom she paid the money.

[As to definition of resulting trusts and the circumstances of their creation, see note in 51 Am. Dec. 751.]

Appeal and Error—Presentation of Ground of Review in Court Below—Necessity.

2. Where the case proceeded on the theory that defendant had denied plaintiffs' averments of fraud, and other paragraphs of the complaint containing similar averments were denied, the fact that two paragraphs were not specifically traversed cannot be taken advantage of on appeal; plaintiffs not having pointed out the defect.

Partition—Decree—Vacation—Evidence.

3. In a suit to set aside a decree of partition, evidence *held* to show that it was a family settlement and was not the result of fraud or oppression.

Partition—Decree—Validity.

4. A partition decree, which represented the result of a family settlement made in good faith, will not be disturbed because one attorney acted for all parties, some of whom were infants.

[As to parol partition and its validity, see note in 92 Am. Dec. 121.]

Infants—Guardian ad Litem—Adverse Interest.

5. In a proceeding for the partition of lands, the appointment of the mother of one of the infant heirs as its guardian *ad litem* will not avoid the decree, though it would have been better to have appointed someone not interested; the court having jurisdiction of the proceedings, and there being no taint of fraud.

Partition—Decrees—Reformation.

6. In a proceeding to reform and set aside a decree of partition, where one of the defendants admitted that she was only entitled to a dower interest instead of a fee, relief will be granted as to her.

Partition—Decrees—Proceedings to Set Aside—Evidence.

7. In a proceeding to set aside a partition of land, evidence *held* to show that the improvements on the tract awarded to defendant were made by her.

From Marion: WILLIAM GALLOWAY, Judge.

Department 2. Statement by MR. JUSTICE HARRIS.

This is a suit by Grace Howell, Katie Howell Uhrig and Guy N. Howell against Fiducia F. Howell and Amy N. Howell. The facts are as follows:

Joseph H. Howell and the defendant Fiducia F. Howell were husband and wife, and John M. Howell was their only child. The plaintiffs Grace Howell, Katie Howell Uhrig and Guy N. Howell are the children of John M. Howell and the defendant Amy N. Howell. John M. Howell died intestate on July 26, 1907, and the death of Joseph H. Howell occurred on June 7, 1909. W. D. Mohney and wife on March 14, 1890, conveyed 15.61 acres to J. H. Howell and J. M. Howell; and on March 23, 1891, H. A. Thomas and George W. Watt transferred an adjoining 20 acres to J. H. Howell and J. M. Howell. After the death of John M. Howell, a suit was commenced on August 3, 1908, by J. H. Howell and Fiducia F. Howell, against Amy N. Howell and her three children, for the purpose of partitioning the 35 acres held in the name of Joseph H. Howell and his deceased son John M. Howell. The complaint filed in the partition suit alleged that the parties thereto were the "owners as joint tenants" of the land described; that Joseph H. Howell and Fiducia F. Howell "together have an undivided one-half interest therein; that the defendant Amy N. Howell has an undivided one-fourth interest therein; that the defendant Guy N. Howell has an undivided one-twelfth interest therein; that the defendant Katie Howell has an undivided one-twelfth interest therein; that the defendant Grace Howell, a minor, has an undivided one-twelfth interest therein." Grace Howell was a minor of the age of about 13 years, and her mother, Amy N. Howell, was, upon the

application of the attorney who represented all the parties, appointed guardian *ad litem*. All the defendants in the partition suit signed and on September 4, 1908, filed, an answer which recited:

"That the respective interests or portions of the real property described in the complaint herein are correct, and we would ask the court to order a partition of the property in accordance with the complaint herein."

The court appointed referees who divided the land by allotting the 15.61-acre tract to J. H. Howell and F. F. Howell, 11 acres to Amy N. Howell, and 3 acres to each of her three children. The report of the referees was confirmed and a final decree entered on November 21, 1908. Joseph H. Howell left no writing concerning the disposition of his property except an instrument, dated August 24, 1908, which had been prepared and signed by him, was witnessed, and reads thus:

"Know all men by these presents that I, J. H. Howell, being of sound mind, do give and bequeath all of my real and personal property to my wife Fiducia F. Howell to have and hold for her use as she may think best to sell or dispose of as she wishes."

The grandchildren commenced this suit against their mother and grandmother for the purpose of annulling the decree in partition. The complaint in the instant case charges that Joseph H. Howell employed one attorney who acted for all the parties, that the minor was wronged by the appointment of her mother as guardian *ad litem*, and that the partition suit was tainted with fraud.

After denying the alleged fraud, defendant Fiducia F. Howell claims that a trust resulted in her favor because she furnished \$600 of the money used to pur-

chase the Mohney tract and supplied \$550 of the \$2,000 paid for the 20 acres purchased from Thomas and Watt. The grandmother also relies upon an estoppel arising out of the alleged acquiescence of the plaintiffs in the partition proceedings, coupled with the fact that she built a house upon the 15.61-acre tract partitioned to her. Amy N. Howell defaulted. The trial court decreed that Fiducia F. Howell was the owner in fee simple of all the 15.61 acres allotted to her in the partition suit. The plaintiffs and the defendant Amy N. Howell appealed. **MODIFIED.**

For appellant-defendant, Amy N. Howell, there was a brief and an oral argument by *Mr. Isaac H. Van Winkle*.

For appellants-plaintiffs, Grace Howell, Katie Howell Uhrig and Guy N. Howell, there was an oral argument together with a brief on the essential requisite to establish a resulting trust, by *Mr. Claire M. Inman*, to this effect:

It is indispensable to the establishment of a resulting trust that payment of the purchase price *should actually be made by the person asserting the trust*, or a binding obligation therefor incurred by him, *as a part of the original transaction* at or before the time of conveyance. Payment at some subsequent time is not sufficient: *De Roboam v. Schmidtlin*, 50 Or. 388, 393 (92 Pac. 388); *Sisemore v. Pelton*, 17 Or. 546, 554 (21 Pac. 667).

As the trust results from the payment of the consideration, if the party claiming to be the beneficial owner has made no payments, *he cannot show by parol evidence that the purchase was made for his benefit*, for that might involve no more than a breach of a parol contract to purchase and hold in trust for him.

This would be to overturn the statute of frauds: *Taylor v. Miles*, 19 Or. 553 (25 Pac. 143); *Dudley v. Bachelder*, 53 Me. 408, 409.

Equity courts are stringent in the requirement of unquestionable evidence to establish a resulting trust, and "it is settled by a complete unanimity of decisions that such evidence must be clear, strong, unequivocal, unmistakable, and must establish the fact of payment by the alleged beneficiary beyond a doubt": *Sisemore v. Pelton*, 17 Or. 553, 554 (21 Pac. 667).

If the party claiming the benefit of the trust gives or loans money or property to the purchaser who pays the purchase price on his own account, this does not raise a resulting trust in favor of the party advancing the money, for the payment is in such case made by the purchaser with his own funds. The consideration of the purchase must belong to the alleged *cestui que trust*, and if he advances it to the party making the purchase as a loan or gift, there can be no resulting trust in his favor. The payment by the alleged *cestui que trust* must be made by him in the character of a purchaser as a part of the original transaction: *Dudley v. Bachelder*, 53 Me. 406-409; *Williamson v. Roberts*, 70 Or. 126 (140 Pac. 633).

For respondent, Fiducia F. Howell, there was a brief and an oral argument by *Mr. George G. Bingham*.

MR. JUSTICE HARRIS delivered the opinion of the court.

If the theory of the plaintiffs is correct, Joseph H. Howell and his son John M. Howell were tenants in common, owning equal interests in two tracts of land which aggregated 35 acres; upon the death of John

M. Howell his undivided one half, by operation of law, descended to his three children subject to the dower interest possessed by Amy N. Howell; the writing, which Joseph H. Howell prepared and no doubt believed would serve as his will, did not provide for or mention John M. Howell or his children, and was therefore not binding upon the plaintiffs (Sections 7325 and 7348, L. O. L.); and if the decree rendered in the partition suit is annulled, the grandchildren become the owners as tenants in common of the 35 acres, subject only to the unadmeasured dower interests of Amy N. Howell and Fiducia F. Howell. The grandmother combats the contention made by plaintiffs and in part rests her asserted rights upon the claim that she furnished money with which to buy the land in dispute; she affirms that the partition suit was free from fraud and therefore effective; and she insists that her title is impervious to attack because the plaintiffs acquiesced in and apparently were satisfied with the division of the land and without protest permitted her to expend money in the construction of a house when they knew that she believed the structure was being erected on her own land.

1. Joseph H. Howell and his wife came to this state shortly after the Civil War and lived in Salem about ten years, during two years of which period the husband was sick or unable to secure employment. In 1867 Solomon Durbin and wife conveyed a lot in Salem to Joseph H. Howell for \$2,000, of which \$1,000 was paid at the time and the remainder was furnished by Fiducia F. Howell from the profits in a millinery business which she was conducting. After living in Salem about ten years, they removed to a farm for which they paid a considerable sum and which for conven-

ience will be called the Santiam farm. They had attempted to purchase the Santiam farm, which is a portion of the wife's part of the Valentine donation land claim, but afterward discovered that the title had never passed from the federal government. The Durbin lot which had been purchased in 1867 was sold for \$2,000, and this money, together with about \$500 which Fiducia F. Howell supplied, was lost by paying it on the attempted purchase of the Santiam farm. Upon ascertaining that title to the Valentine donation land claim had failed, Joseph H. Howell entered upon 160 acres of the premises as a homestead and obtained a patent on April 10, 1882. One Downer pre-empted a part of the land but afterward surrendered possession before perfecting his right to a conveyance, and thereupon John M. Howell was sent for by his parents, and he made a homestead entry upon the portion surrendered by Downer and received a patent on April 10, 1889. John M. Howell and his parents resided on the Santiam farm until about 1888, when they removed to Salem. They had not prospered and were indebted to the Williams & England Bank. Fiducia F. Howell obtained employment for about ten months at the Indian School, and then she served meals for twelve years in the State House, where J. H. Howell was head janitor. Her husband was receiving \$75 per month, and the business of serving meals gradually increased until the wife made as much as \$100 per month; but during the first two years at the State House her earnings went into the common purse. The Mohny tract, consisting of 15.61 acres, was conveyed to J. H. Howell and his son by a deed dated March 14, 1890, for the sum of \$1,560. W. D. Mohny testified that he made the bargain with John M. Howell; that the price was

\$100 per acre; that \$100 was paid down and a 30-day note was given for the balance; that John said that he and his father were buying the land together, and he could get the balance of the money in thirty days; that upon the expiration of the 30 days the note was taken up and the deed delivered. On March 12, 1890, J. H. Howell and wife and J. M. Howell and wife borrowed \$1,500 from the board of commissioners for the sale of school and university lands and gave a mortgage on the Santiam farm to secure the note. The evidence persistently points to the conclusion that the money was borrowed for the purpose of paying Mohney. A part of the Santiam farm was sold to L. Hobson on August 21, 1893. The mortgage was canceled on the same day, and, according to the testimony of L. Hobson, the encumbrance was satisfied out of the moneys he paid to the Howells.

It is not necessary to ascertain how much money Fiducia F. Howell furnished for the Thomas and Watt 20-acre tract. She does not claim any interest in that property, nor is she in a position to do so, because the partition suit cut off all her rights to any part of the 20 acres which were allotted to the grandchildren and their mother.

The partition suit did in fact accord recognition to the contributions made by Fiducia F. Howell by awarding her an equal interest with Joseph H. Howell in the Mohney or 15.61-acre tract. It clearly appears that Joseph H. Howell and his son borrowed the funds which were used to purchase the Mohney tract; they gave a mortgage on the Santiam farm to secure the loan; they satisfied the mortgage from proceeds of the sale of the Santiam farm; and consequently the Mohney tract was purchased with their money. It is

true that Fiducia F. Howell paid \$2,500 of her money on the attempted purchase of the Santiam farm, but no title or interest was gained by the payment because the title had not passed from the government. Her money was lost. When title did finally pass, it went to Joseph H. Howell and to J. M. Howell by virtue of the homestead entries made by them. Fiducia F. Howell had confidence in her husband and son, and each had unbounded faith in the other; they worked in harmony and formed a happy partnership; it is quite likely that the strongest hand at the helm was that of the grandmother, and it is probable that her energy and industry contributed most to the common savings; but, the evidence fails to supply the essentials of a resulting trust: *Sisemore v. Pelton*, 17 Or. 554 (21 Pac. 667); *De Roboam v. Schmidtlin*, 50 Or. 393 (92 Pac. 1082); *Williamson v. Roberts*, 70 Or. 126 (138 Pac. 840, 140 Pac. 633); *Chance v. Graham*, 76 Or. 199 (148 Pac. 65). It must be remembered, too, that the grandmother is vouching for the fairness of the decree in the partition suit, because she is claiming under a decree which awarded the Mohney tract, not to her alone, but to her and Joseph H. Howell.

2. Plaintiffs contend that paragraphs 11 and 12 of their complaint are impliedly admitted because not denied by the answer, and that therefore these admissions will support an adjudication impeaching the decree in partition. The failure specifically to deny paragraphs 11 and 12 was the result of inadvertence. These two paragraphs in substance alleged that the complaint filed in the partition suit did not truthfully state the interests of the grandchildren nor correctly relate the rights of the mother and grandmother. The paragraphs mentioned also averred that the grand-

parents represented that the attorney employed was competent and would correctly advise all the parties to the suit and that it would not be necessary to secure any other attorney; and that the representations were for the purpose of preventing the grandchildren and their mother from employing a competent attorney to represent them and make a defense to the complaint.

The allegations of fraud found in paragraphs 11 and 12 appear many times throughout the complaint and particularly in paragraphs 10, 13, 14 and 15. Every allegation of fraud in the complaint is especially denied, except the two paragraphs numbered 11 and 12, and the denials are supplemented by a separate defense which affirms that the partition suit was free from fraud. While the answer fails to deny paragraphs 11 and 12, it did traverse the substance of those two paragraphs as found elsewhere in the complaint. It is true that the answer was assailed by a motion and also by a demurrer; but at no time, until after the appeal, was attention called to the failure to deny paragraphs 11 and 12. Evidence was offered by all the parties concerning the allegations of fraud, and the trial proceeded on the theory that the integrity of the partition suit was in issue. It must be borne in mind that:

“Procedure is not the end for which law was instituted, but the means by which justice may be administered in an orderly manner”: *Williams v. Pacific Surety Co.*, 66 Or. 151, 156 (127 Pac. 145, 131 Pac. 1021, 132 Pac. 959, 133 Pac. 1186).

Since the plaintiffs are relying upon a technical defect, they must comply with the requirements of strict technical rules: *Jackson v. Sumpter Valley Ry. Co.*, 50 Or. 455 (93 Pac. 356). It is plain that the defendant

intended to deny every allegation of fraud, and she did deny the charge as it appeared in every paragraph of the complaint except 11 and 12. The plaintiffs did not direct the attention of the trial court to the exact state of the pleadings, but the question of fraud was tried and determined as though in issue, and consequently the plaintiffs have forfeited their right to take advantage of the inadvertence of Fiducia F. Howell: *Minard v. McBee*, 29 Or. 225 (44 Pac. 491); *Missoula Mercantile Co. v. O'Donnell*, 24 Mont. 65 (60 Pac. 594, 991); *Williams v. Hayes*, 20 N. Y. 58.

3, 4. The partition suit was not vitiated by fraud. While there is some evidence to the effect that Amy N. Howell signed the answer with some reluctance, and that the grandfather threatened to dispose of his property so that Guy N. Howell would not receive any of it if the latter did not sign the pleading, still the one fact that stands out with all the certainty and fixedness of the pole star is that the three grandchildren and their mother were thoroughly satisfied with the division of the property made in the partition suit, until it was ascertained that Joseph H. Howell had attempted to will all his property to Fiducia F. Howell. Guy N. Howell testified that his grandfather never deliberately misled him; and furthermore he admitted on cross-examination that the whole trouble had grown up with reference to the 15.61 acres after the death of the grandfather and after it was known that Joseph H. Howell had attempted to devise the land to Fiducia F. Howell. Joseph H. Howell claimed an undivided one-half interest in the two pieces of land aggregating 35 acres, and he told Amy N. Howell as well as others that the grandchildren and their mother owned an undivided one half in both tracts. Two days

before his death John M. Howell urged his mother to have the land divided. The desirability of having the land partitioned was discussed and determined upon by the members of the family before the commencement of the partition suit. The improvements were on the 15.61 tract, but the additional five acres allotted to Amy N. Howell and her children offset the value of the improvements. No one was deceived. Every step was taken in the open, and it was a family settlement with which every interested party was satisfied until a short time before the commencement of the instant suit. It is true that one attorney represented all the parties, but under the circumstances the decree, so far as it concerns Fiducia F. Howell, cannot be lightly regarded and will not be disturbed, where the evidence affirmatively shows that it was essentially a family settlement and all parties concerned wished to act honestly and fairly: *French v. Goin*, 75 Or. 255 (146 Pac. 91); *Loughary v. Simpson*, 75 Or. 219 (145 Pac. 1059).

5. Amy N. Howell had an interest in the subject matter of the partition suit, and the appointment of some other person as guardian *ad litem* might have been better; the mother, however, acted in the capacity of guardian *ad litem* with the permission and approval of the judge, and the results ought not to be less binding unless there was fraud or collusion: *Ivey v. McKinnon*, 84 N. C. 651. Here there was neither collusion nor fraud, although there was an honest mistake as to the extent of the interest held by Amy N. Howell. As between the grandparents and the minor, there was not even a mistake as to the interest owned by Joseph H. Howell, because it is conceded that an undivided one half of the entire property was owned by him. Where the court has complete jurisdiction of the sub-

ject and of the parties, a decree rendered against an infant defendant is as valid and effectual as if taken against an adult, provided there is no evidence of fraud or collusion: *English v. Savage*, 5 Or. 518; *Savage v. McCorkle*, 17 Or. 42 (21 Pac. 444); *Harding v. Harding*, 46 Or. 178 (80 Pac. 97).

6. The defendant Amy N. Howell admits that she only possessed an unadmeasured dower estate in the premises, and that she does not rightfully own a fee-simple interest in the 20 acres. It was the design of the partition suit to allot to the grandparents their proper share severed from any claim of Amy N. Howell and her children. The decree in partition will not be disturbed so far as it relates to the 15.61 acres or Mohney tract awarded to Joseph H. Howell and Fiducia F. Howell; but, since Amy N. Howell admits that the interest of John M. Howell descended to the three children subject to her dower interest, and concedes that the quantities allotted to her and her children at least resulted from error, the admitted mistake appearing in the partition decree is corrected, and the plaintiffs are adjudged to be the owners in fee simple of the 20 acres subject to the dower interest owned by their mother.

7. Fiducia F. Howell owns the undivided one half of the 15.61-acre tract and has a dower interest in the remaining undivided half. A new house costing between \$1,050 and \$1,750 was built upon the Mohney tract while the partition suit was pending. The grandmother contends that her money paid for the building. The plaintiffs contend that the funds used belonged to the joint account of the grandfather and his son. It is significant that the house was being constructed upon land which it was expected would ultimately be owned

by Fiducia F. Howell and her husband, and it is a noteworthy fact that W. H. Dalrymple, who built the house under a verbal agreement, testified that "my contract with her (meaning Fiducia F. Howell) was \$1,050." The preponderance of the evidence points to the conclusion that Fiducia F. Howell furnished the money for the construction of the building referred to in the record as the new house. Fiducia F. Howell, who is now about 79 years of age, and has been blind since 1906, is entitled to reap the fruits of the partition suit by using or selling or otherwise disposing of her interest without any further delay. The decree on this appeal is final, and it will not be necessary to prosecute the suit which she instituted to enforce the decree in partition.

The decree of the trial court is modified, without judgment for costs or disbursements in the court.

MODIFIED.

MR. JUSTICE MCBRIDE, MR. JUSTICE EAKIN and MR. JUSTICE BEAN concur.

Argued September 22, dismissed October 13, 1915.

JOY v. PALETHORPE.*

(152 Pac. 230.)

Adverse Possession—Continuity.

1. Where title to plaintiff's and defendant's lot had united in one owner within 10 years from the construction of a walk alleged by plaintiff to be a foot or so on defendant's lot, there was a break in the continuity of the adverse possession, and plaintiff's adverse possession dated only from the time of his purchase from such owner.

[As to the necessity and requisites of continuity of adverse possession, see note in 13 Am. Dec. 185.]

*Unbroken continuity as essential element of adverse possession is discussed in note found in 15 L. R. A. (N. S.) 1202. REPORTER.

Boundaries—Boundary Agreement—Estoppel.

2. An agreement between adjoining owners as to a boundary line operated solely by way of estoppel.

[As to location of boundary by acquiescence or agreement, see notes in 69 Am. Dec. 711; 27 Am. Rep. 239.]

Boundaries—Estoppel—Pleading.

3. An estoppel by agreement of the parties respecting a boundary line must be pleaded.

Dismissal and Nonsuit—Defects in Pleadings.

4. Where plaintiff, in a suit to establish his title by adverse possession to a strip of land covered by his wall and sidewalk, failed to plead the actual title which his evidence tended to prove, and did not allege the estoppel by reason of an agreement as to a boundary line which he attempted to show at the trial, and his claim of adverse possession had been broken by unity of both estates, and defendant showed no title in himself and claimed no damages, the court could not render substantial justice without disregarding the pleadings, and would dismiss without prejudice to another suit.

From Multnomah: WILLIAM N. GATENS, Judge.

Department 1. Statement by MR. JUSTICE McBRIDE.

This is a suit brought by Allan R. Joy against Mabel Palethorpe to enjoin defendant from repeated trespass upon certain property described in the complaint and to quiet plaintiff's title thereto.

The complaint alleges that plaintiff is the owner in fee simple of lot 10, block 8, Richmond Addition to the City of Portland, Multnomah County, Oregon, together with all buildings and improvements thereon and all appurtenances thereunto belonging, therewith had, or enjoyed, including a sidewalk running north and south at the easterly extremity of said property and a cement wall in front extending to the easterly edge of said sidewalk and supporting the soil of said lot; that said sidewalk and said wall extend over upon the adjoining lot on the east, to wit, upon lot 12, in block 8, in said Richmond Addition, for a distance of 15 inches; that said sidewalk and said wall are necessary for the use and enjoyment of plaintiff's said property, and that this

plaintiff and his grantors have occupied and possessed the ground covered by said walk and said wall, to wit, a strip 15 inches wide and 100 feet deep, being the westerly 15 inches of said lot 12, block 8, Richmond Addition, openly and notoriously and adversely to this defendant and her grantors, and have used and enjoyed the same continuously and under a claim of right for more than 22 years last past; that defendant is the owner of the adjoining lot on the east, to wit, said lot 12, in block 8, of said Richmond Addition, save and except the aforesaid strip of 15 inches in width running back 100 feet and being the westerly 15 inches of said lot 12, occupied and possessed by plaintiff as aforesaid; that many years ago the defendant built and established a fence on the easterly line of plaintiff's said walk and wall running the entire length of defendant's said lot, thereby separating plaintiff's property from defendant's property; that defendant has ever since maintained said fence, and that the same is now standing as originally erected, and marks the true and legal line between the property of this plaintiff and defendant; that plaintiff's title has been and is definitely fixed and established to, and that plaintiff is the owner of all of the hereinbefore described property lying west of, defendant's said fence. The complaint recites various trespasses of defendant and alleges that she threatens to take forcible possession of plaintiff's walk and wall, and that she is insolvent and unable to respond in damages.

The answer admits that plaintiff is the owner of lot 10, in block 8, and admits that his sidewalk extends over and upon defendant's lot, but denies every other allegation of paragraph 1 of the complaint. Answering paragraph 2 of the complaint, defendant admits

that she is the holder of the record title to lot 12, of block 8, and denies every other allegation therein. She then sets up title in herself to the whole of lot 12, and alleges that plaintiff has, within the past 5 years, wrongfully constructed a cement walk which extends over and upon plaintiff's lot 12 or 16 inches, more or less, and has also built a wall in front of lot 10, which extends 16 inches, more or less, over and upon the west side of her lot, and that he wrongfully refuses to remove the same, and pleads adverse possession of said strip. There was a reply traversing the new matter in defendant's answer. Upon the trial there was a decree quieting defendant's title to the disputed strip and awarding her \$100 damages, from which plaintiff appeals.

DISMISSED WITHOUT PREJUDICE.

For appellant there was a brief with oral arguments by *Mr. John Van Zante* and *Mr. Allan R. Joy*.

For respondent there was a brief and an oral argument by *Mr. Cicero M. Idleman*.

MR. JUSTICE MCBRIDE delivered the opinion of the court.

Stripped of all verbiage, plaintiff's complaint must be taken to allege that he had title by adverse possession, to a strip of land 15 inches in width and extending along the westerly side of lot 12, in block 8. It is clear, as conceded by the pleadings, that the record title to the whole of lot 12 is in defendant. Upon the trial plaintiff called as a witness one J. M. Cheaver, who testified, in substance, that he had lived in Richmond Addition and was familiar with its conditions ever since it had been laid out, and was acquainted with the premises in dispute; that 16 or 17 years before the

trial one Meeks owned lot 10 and Judge Arthur Frazer lot 12; that shortly after they bought he was present and assisted in fixing the line for the purpose of building a division fence; that for a starting point he took a post at a lot corner on Clinton Street and stuck up a long pole at this place; that Frazer stood at the corner of his lot and Meeks stood in the middle, and they sighted through, thereby ascertaining the west line of the lot, and a fence was placed accordingly; that the stakes he measured from were the original stakes set when the survey of the addition was made, and he supposed they were where they were originally placed, as he never saw them moved. Mrs. A. L. Frazer corroborated Cheaver's testimony as to the building of the fence and walk, and testified that roses were planted along the fence at the easterly edge of the walk. Mrs. Dunham testified that she moved into the house on lot 12 in 1899 and remained there until 1904; that Meeks was then living in the other house, and that there was a board walk running along the easterly side of his lot, which was supposed to belong to him; that she did not know whether it was on the line or not, as there was never any question about it. She stated she never used the walk unless she wished to go to Meek's back door, and that it was not used in common. Plaintiff Joy testified that he bought the property in 1906, and had been in possession of it ever since; that when he went into possession there was a board walk on the easterly side, which he had subsequently replaced with the present cement walk; that before he purchased he made inquiry, and was informed that the east line of lot 10 was along the east side of the walk; that nearly 8 years before the trial defendant put up a fence composed of iron posts and woven wire along the east side of the

wooden walk, which was the same walk described by witness Cheaver; that the fence was exactly on the line according to the original platting of the addition. Meeks, called by defendant, corroborated Cheaver as to the establishment of the line, and asserted that the fence was placed upon the true line of the lot. The defendant testified that the fence placed by her was merely temporary to prevent dogs from running over sweet peas and other flowers planted upon her lot, and that she never intended to recognize it as the true line; that she had had a survey made which showed the true line to be where she now claimed it, and that in replacing the board walk with the cement walk plaintiff had crowded from one and one half to three inches farther to the east; that she knew that the fence was inside the east line of lot 12 when the trellis was put up. Defendant stated that a survey made by the city and county surveyor showed that she did not have the 50 feet of frontage that she should have; that they began the survey at the section line on Division Street. No notes of such surveys were produced, and the surveyors who made them were not called. Other testimony showed that in 1901 the title to both lots passed to the United States Loan & Savings Society, which held it until 1906, when it sold lot 10 to plaintiff, and later sold lot 12 to defendant.

1-3. It is clear that plaintiff's claim of adverse possession by himself and his grantors of the disputed strip cannot be maintained for the reason that before the 10 years from the date of erection of the original walk expired the title and possession of both properties became united in the United States Loan & Savings Society, which did not sell to plaintiff until 1906. As this corporation could not hold adversely to itself,

the continuity of the adverse possession was broken, and plaintiff's adverse possession dates only from 1906, which is less than 10 years before the commencement of this suit. The complaint expressly alleges that the disputed strip projects 15 inches over on defendant's lot, which is admitted. Plaintiff has pleaded one case, while his testimony strongly tends to prove another. The testimony of Meeks and Sheaver indicates that the line between the lots was ascertained shortly after the addition was platted, and while the original lot stakes were still visible, and it seems most probable that the original boundary line of the lots ran substantially along the east line of plaintiff's present walk. As to that matter it is not a question as to whether or not defendant's lot contained a full 50-foot frontage, but where the lines originally ran upon the ground. The evidence as to an agreed line between Frazer and Meeks has no bearing here because such an agreement operates solely by way of estoppel: *Vosburgh v. Teator*, 32 N. Y. 561. In this state an estoppel of this character must be pleaded: *Rugh v. Ottenheimer*, 6 Or. 231 (25 Am. Rep. 513); *Remillard v. Prescott*, 8 Or. 37; *Bays v. Trulson*, 25 Or. 109 (35 Pac. 26); *First Nat. Bank v. McDonald*, 42 Or. 257 (70 Pac. 901); *Haun v. Martin*, 48 Or. 304 (86 Pac. 371); *Ashley v. Pick*, 53 Or. 410 (100 Pac. 1103).

4. As the case stands, plaintiff had failed to plead the actual title which his evidence tends to prove, and has failed to allege the estoppel by reason of the agreement as to the boundary line and the acquiescence therein by Frazer and defendant, which he attempted to establish on the trial, while, as already stated, his chain of adverse possession was broken by the union of both estates in a common ownership. The defend-

ant has shown no title in herself to the strip in controversy beyond the admission in plaintiff's complaint, which, as stated on the trial and shown by the testimony, was probably a mistake. There was no claim for damages and no evidence of any damage whatever to defendant's freehold beyond merely nominal damages. It is evident that the condition of the pleadings was such that the court was unable to render substantial justice without wholly disregarding them.

The suit will therefore be dismissed at plaintiff's cost, without prejudice to either party to bring another suit to settle their respective rights to the property in controversy.

DISMISSED WITHOUT PREJUDICE.

MR. CHIEF JUSTICE MOORE, MR. JUSTICE BURNETT and
MR. JUSTICE BENSON CONCUR.

Argued September 10, affirmed September 28, rehearing denied October 19, 1915.

TEMPLE v. PORTLAND.*

(151 Pac. 724.)

Municipal Corporations—Public Improvements—Pavements.

1. Where the patentee offers to all bidders alike the right to make use of the patented article upon reasonable terms, there is no objection to specifying a patented pavement.

Municipal Corporations—Public Improvements—Patented Pavements.

2. The Portland City Charter (Sp. Laws 1903, p. 3), empowering the council to order a street to be improved, authorizes it to determine the character, kind, and extent of such improvement. Other sections provide for the preparation of plans, authorize remonstrances, and declare that such contract shall be let to the lowest responsible bid.

*As to validity of contract for material patented or held in monopoly where a letting to the lowest bidder is required, see note in 46 L. E. A. (N. S.) 990.

der for either the whole of such improvement or part. The city council selected a patented pavement to be used on an improvement, and the contract provided that the contractor should also lay the sidewalks. The holder of the letters patent made no provision for other bidders using the patented pavement, and only the one bid was secured. *Held* that, in view of the fact that sidewalks wholly unconnected with the patented pavement were included in the contract, the acts of the council were void under the charter, because stifling competition.

Patents—Exclusive Rights—Constitution.

3. A holding that a city could not specify and make a patented pavement alone acceptable for a public improvement does not violate the patentee's constitutional right to have the exclusive right to manufacture and sell the patented article.

Municipal Corporations—Assessments—Objections—Estoppel.

4. That some of the plaintiffs petitioned for a patented pavement, the improvement to be made in conformity with the charter does not estop them from attacking the assessment on the ground that the resolution, by solely specifying the patented pavement, violated the charter provisions for competition.

From Multnomah: ROBERT G. MORROW, Judge.

In Banc. Statement by MR. JUSTICE HARRIS.

Alfred O. Temple and 62 other property owners commenced this suit for the purpose of enjoining the authorities of the City of Portland from levying or collecting assessments to pay for a street improvement. On October 14, 1909, 6 of the plaintiffs herein and 12 others filed a petition for the improvement of Lombard Street, from the west line of Westanna Street to the east line of Wabash Avenue, in the City of Portland, by grading the street to the established grade and paving with Hassam pavement "in conformity with the charter, ordinances, and regulations of the said City of Portland." The council directed the city engineer to prepare plans and specifications for an appropriate improvement and to estimate the probable cost of the work, and thereafter the city engineer prepared and filed plans and specifications for the improvement, together with an estimate of the

amounts of the different kinds of work required to be done. The specifications stated that:

“The improvement shall consist of grading the street to the proper subgrade, paving the roadway with Hassam, constructing artificial stone sidewalks and curbs, laying vitrified, cast iron, and corrugated drain-pipe, wood headers, and inlets. * * The entire width of such right of way shall then be improved with Hassam.”

The council adopted a resolution reciting an intention to make the street improvement, and approving the plans, specifications, and estimates of the city engineer. This resolution was published in the city official newspaper and posted at each end of the proposed improvement, and notice was given that remonstrances might be filed within 20 days from the date of the first publication of the notice. No remonstrance having been filed, the council passed an ordinance providing for the improvement of the street. The ordinance enacts that the roadway of the street shall be paved with Hassam pavement; that artificial stone sidewalks and curbs shall be constructed; that vitrified, cast iron, galvanized, and corrugated galvanized pipe and wood headers shall be laid; and that inlets and outlets shall be constructed. Having been notified of the passage of the ordinance, the executive board caused the auditor to publish notices calling for bids. The published notices informed all bidders that:

“The contract for the improvement of the above-named street will be awarded to the lowest responsible bidder for the whole of the improvement.”

A contract for the improvement was made with the Oregon Hassam Paving Company, a corporation, which was the sole bidder. The contract was made

on the unit basis, the contractor agreeing to lay Hassam pavement at \$1.85 per square yard and do the other work for a specified sum per cubic yard or square foot or lineal foot. After publication of the required notice, the executive board on August 11, 1911, accepted the work performed by the Oregon Hassam Paving Company; and thereafter the council proceeded to levy assessments, to the amount of the cost of the improvement, upon the property specially benefited. The trial court decreed that the acts of the council and executive board were void, and enjoined the city from making the cost of the improvement a charge against the properties of the plaintiffs, "except as to such plaintiffs as have voluntarily bonded their property for said improvement, or have voluntarily agreed to pay an assessment for said improvement, provided that nothing in this decree shall be construed to prevent the city from exercising whatever power of reassessment it may have." The defendant appealed. AFFIRMED. REHEARING DENIED.

For appellant there was a brief over the names of *Mr. Walter P. La Roche*, City Attorney, and *Mr. Lyman E. Latourette*, Deputy City Attorney, with an oral argument by *Mr. Latourette*.

For respondents there was a brief over the names of *Mr. R. F. Peters*, *Mr. Charles H. Abercrombie* and *Mr. R. F. Hunt*, with an oral argument by *Mr. Peters*.

MR. JUSTICE HARRIS delivered the opinion of the court.

1. The plaintiffs argue that the acts of the city were void, because the council in advance selected Hassam as the kind of pavement to be laid, thereby eliminat-

ing the possibility of competition. It has already been determined that there can be no objection to specifying a patented pavement, where the patentee offers to all bidders alike the right to make use of the patented article upon reasonable terms: *Johns v. City of Pendleton*, 66 Or. 182 (133 Pac. 817, 134 Pac. 312, Ann. Cas. 1915B, 454, 46 L. R. A. (N. S.) 990); *Sherrett v. City of Portland*, 75 Or. 449 (147 Pac. 386). Hitherto it has not been necessary to decide the question of whether or not a municipality may legally specify a patented pavement, make it alone acceptable for a proposed street improvement, and then call for bids when no one except the patentee is in a position to make a proposal for the work; but we have now reached the point where this court must follow the way marked out in *Hobart v. Detroit*, 17 Mich. 246 (97 Am. Dec. 185), or adopt the rule promulgated in *Dean v. Charlton*, 23 Wis. 590 (99 Am. Dec. 205).

2. It is necessary to give some attention to the municipal charter: Sp. Laws 1903, p. 3. The council is empowered to order a street to be improved, "to determine the character, kind, and extent of such improvement," and to levy assessments upon land specially benefited by the improvement: Section 374. If the council deems it necessary to improve a street, it must require the city engineer to prepare plans and specifications and to estimate the amount and probable cost of the work. If the plans, specifications and estimates of the engineer are approved, the council declares its intention to make the improvement, notice of which is required to be given: Section 375. Opportunity to remonstrate is afforded: Section 377. If a sufficient remonstrance is not filed, "the council shall be deemed to have acquired jurisdiction to order the improvement to be made," and the council may within

a specified time, "by ordinance, provide for making said improvement, which shall conform in all particulars to the plans and specifications previously adopted": Section 378. The estimates, plans, specifications and a copy of the ordinance are then presented to the executive board, which body has the power to award the contract for the improvement; but "such contract or contracts shall be let to the lowest responsible bidder for either the whole of said improvement or such part thereof as will not materially conflict with the completion of the remainder thereof," and the board shall have the right to reject any or all proposals received: Section 379.

It will be remembered that the council first selected Hassam pavement and that the notice for bids called for proposals on the improvement as a whole. While the composition generally known as concrete pavement contains the identical ingredients found in Hassam pavement, it is asserted that the process employed for laying the latter is protected by letters patent. The Oregon Hassam Paving Company claimed and exercised the exclusive right to lay Hassam pavement, and did not offer to permit any other person to make use of the Hassam process. The Oregon Hassam Paving Company was the sole bidder and received the contract. The answer expressly admits that:

"There is now, and for many years last past has been, in use in the City of Portland, and laid and constructed therein, several other kinds and classes of pavement, which are equally durable, and in some respects equally good, as the pavement specified in the foregoing proceedings, and that as to some of such kinds and classes of pavement there is and may be open, free and full competition, and that persons, companies, and corporations engaged in street improvement work may contract for and obtain in an open

market all of the necessary materials for the making of the same.”

The situation presented here is one where the pavement laid was designated by name, and the kind named was alone made acceptable; there was no chance for competition, because the right to lay the kind of pavement specified was exercised exclusively by the Oregon Hassam Paving Company, which was the only bidder; and all persons were notified that proposals to do the work must cover the improvement as a whole, notwithstanding the fact that a substantial part of the improvement was in no way connected with or a part of the patented pavement. There was no opportunity for competition. There are two rules: One is known as the Wisconsin rule, as found in *Dean v. Charlton*, 23 Wis. 590 (99 Am. Dec. 205), while *Hobart v. Detroit*, 17 Mich. 246 (97 Am. Dec. 185), exemplifies the Michigan doctrine. So much has been said for and against the two conflicting rules that nothing can be added to what already has been said. Under the Wisconsin rule, where its charter requires the letting of a contract to the lowest responsible bidder, a municipality is without authority to specify any patented pavement as the only one to be used in a street improvement, because to do so would completely eliminate competition, foster monopoly and promote favoritism. The conclusion reached in *Dean v. Charlton*, 23 Wis. 590 (99 Am. Dec. 205), has been approved by the following cases: *State v. Elizabeth*, 35 N. J. Law, 351; *Nicolson Pavement Co. v. Painter*, 35 Cal. 699; *Fishburn v. Chicago*, 171 Ill. 338 (49 N. S. 532, 63 Am. St. Rep. 236, 39 L. R. A. 482); *Burgess v. Jefferson*, 21 La. Ann. 143; *Fineran v. Central Bitulithic Paving Co.*, 116 Ky. 495 (76 S. W. 415, 3 Ann. Cas.

741); *Monaghan v. Indianapolis*, 37 Ind. App. 424 (75 N. E. 424). The Michigan doctrine sustains the right to previously select a patented pavement and then to call for bids, and *Hobart v. Detroit*, 17 Mich. 246 (97 Am. Dec. 185), has been strongly indorsed in other jurisdictions: *Barber Asphalt Co. v. Hunt*, 100 Mo. 22 (13 S. W. 98, 18 Am. St. Rep. 530, 8 L. R. A. 110); *In re Dugro*, 50 N. Y. 513; *Newark v. Bonnell*, 57 N. J. Law, 424 (31 Atl. 408, 51 Am. St. Rep. 609); *Bye v. Atlantic City*, 73 N. J. Law, 402 (64 Atl. 1056); *Ryan v. Paterson*, 66 N. J. Law, 533 (49 Atl. 587); *Saunders v. Iowa City*, 134 Iowa, 132 (111 N. W. 529, 9 L. R. A. (N. S.) 392); *Yarnold v. Lawrence*, 15 Kan. 126; *Holbrook v. Toledo*, 28 Ohio C. C. 284; *Silsby Mfg. Co. v. Allentown*, 153 Pa. 319 (26 Atl. 646).

It is argued that Section 374 of the charter empowers the council to specify and call for bids upon a patented pavement to the exclusion of all others, because by the terms of that section the council is authorized "to determine the character, kind and extent" of a proposed improvement; but the quoted language must be read in the light of the remaining charter provisions. The charter must be construed as a whole, and when so interpreted it is clear that it was not intended that competition should be throttled; but, on the contrary, Section 379, making it the imperative duty of the executive board to let a contract to the lowest responsible bidder, necessarily implied that there shall be opportunity for competition, so that the public will gain all the benefits which are naturally and necessarily produced by strife for business; and since the charter does prescribe a mode for the exercise of the power, the mode becomes the measure of the power: *Terwilliger Land Co. v. City of Portland*, 62 Or. 101 (123 Pac. 57). The municipality is not

necessarily deprived of the right to make use of a patented pavement. It is common knowledge that it is the practice in more than one city so to frame the specifications as to enable different kinds of pavements to compete with each other. There is no hesitancy in fixing upon the Wisconsin rule as the one to be applied in this and analogous cases in this jurisdiction, when it is remembered that, regardless of the force of the arguments, when considered in connection with the mere theories of the Michigan doctrine or of the Wisconsin rule, the practical result of opening the doors to competition for all public improvements has been to the marked advantage of the public; and, moreover, the citizens of a municipality can generally adjust their charter to suit their wishes, because under the present form of our Constitution they are not dependent upon the will of the legislature, but have it within their own power to enact or amend their charter.

In the instant case a considerable and substantial portion of the improvement could have been segregated from the Hassam pavement. It must, of course, be admitted that the proper laying of the pavement depended upon the manner in which the subgrade was prepared, and consequently all the work necessarily preparatory for laying Hassam was for all practical purposes connected with laying the pavement; but the sidewalks could have been constructed separate and apart from the pavement. It is true that the testimony shows that experience has demonstrated that better results generally have been obtained where the contract for the entire improvement has been let to one person; and it is also true that the charter permits the executive board to let a contract to a bidder for the whole or a part of the improvement. The Oregon

Hassam Paving Company possessed a monopoly on Hassam pavement, but it was a monopoly which was legalized and sanctioned by letters patent. No person had the exclusive right to lay the sidewalks, and yet the notice for bids tied up a considerable portion of the work, which was not patented, to the remaining part of the improvement, which was patented, and by so doing a monopoly was given to the Oregon Hassam Paving Company, not only on the patented portion, but also on the nonpatented part, of the proposed improvement. The method employed would be obnoxious, even in those jurisdictions where the Michigan rule is followed. In the *Matter of the Petitions of Laura E. Eager*, 46 N. Y. 100, the court says:

“Even if we should hold that patented articles may be contracted for by the city, notwithstanding the impossibility of competition, we ought to stop there, and not go to the length of sanctioning a practice whereby competition may be prevented, by unnecessarily coupling a work not patented with one which is patented, and advertising for an entire proposal for the whole.”

3. It is also contended by the city that an interpretation of the charter which would cause the charter to prohibit the city from specifying and making a patented pavement alone acceptable would be in conflict with the federal Constitution. The exclusive right of the patentee to the invention covered by his letters patent is still recognized, and he is not prevented from offering his wares for sale. Letters patent do not confer upon the patentee the right to prevent other persons from offering their wares for sale, where there is no infringement, and yet such would be the result if the argument of defendant is pursued to its logical conclusion.

4. The mere fact that 6 of the 63 plaintiffs signed a petition for Hassam pavement will not bar all the plaintiffs from maintaining this suit. Moreover, the petition did not authorize a violation of the charter, but, on the contrary, it asked that the improvement be done "in conformity with the charter." The council did not follow the mode prescribed by the charter. The mode measured the power, and the plaintiffs did not take part in any transaction which would work an estoppel: *Terwilliger Land Co. v. Portland*, 62 Or. 101 (123 Pac. 57). If Hassam is a mere trade name, the charter was infringed upon; and the charter was likewise violated if Hassam is in fact protected by letters patent.

The decree is affirmed.

AFFIRMED. REHEARING DENIED.

Application to stay execution pending appeal allowed July 31, 1914.
Argued on the merits September 17, affirmed September 28, rehearing denied October 19, 1915.

KOLLOCK & CO. v. LEYDE.

(143 Pac. 621; 151 Pac. 733.)

Appeal and Error—Stay of Proceedings—Counter Undertaking—"Suit upon a Contract."

1. A suit to foreclose a mechanic's lien is not "a suit upon a contract," within Section 553, L. O. L., providing for the enforcement of a judgment or decree in such a suit, notwithstanding an appeal and undertaking for the stay of proceedings, upon the giving of a counter undertaking.

Appeal and Error—Stay of Proceedings—Temporary Injunction.

2. The Supreme Court has power to issue a temporary injunction to preserve the *status quo* of property pending an appeal.

ON THE MERITS.

Mechanics' Liens—Actions—Evidence.

3. In a suit to establish a mechanic's lien, evidence held to show that the laths furnished were of the proper quality.

Mechanics' Liens—Foreclosure—Evidence.

4. In a suit to foreclose a mechanic's lien, evidence *held* to show that the plaster furnished was of proper quality.

Mechanics' Liens—Foreclosure—Quality.

5. In a suit to foreclose a mechanic's lien for materials ordered by a carpenter, evidence *held* to show that the owners authorized the orders.

Mechanics' Liens—Foreclosure—Description.

6. Where householders owned several adjoining lots, a lien statement which correctly gave the number of the house and the description of the block and street is sufficient, under section 7420, L. O. L., though the lot number given was not the lot on which the house was located, for the description would be sufficient, if the lot number was disregarded as surplusage.

[As to when mechanic's lien may include property in addition to that upon which work was performed, see note in 65 Am. St. Rep. 165.]

Mechanics' Liens—Foreclosure—Burden of Proof.

7. One seeking to foreclose a mechanic's lien is not bound to show that the materials went into the building; but defendants, desirous of showing that the materials were not used, have the burden of proving that fact.

From Multnomah: GEORGE N. DAVIS, Judge.

Department 2. Statement by MR. CHIEF JUSTICE
MCBRIDE.

This is a suit by L. R. Kollock & Company, a corporation, against E. C. Leyde, E. A. Pearson and Hilma Pearson, husband and wife, F. J. Berger and Albert Berger, copartners doing business as Williams Avenue Planing Mill, and Jacob Stern, wherein plaintiff sued to foreclose certain mechanics' liens upon a building and lot in Portland, and on the trial had a decree of foreclosure and order of sale. Defendants appealed, and filed the stay bond provided by Section 551, subdivision 4, L. O. L. Whereupon plaintiff filed the counter undertaking required by Section 553, L. O. L., and caused execution to issue, and the property was advertised for sale. Defendant applies for an order of this court enjoining such sale pending the appeal.

ALLOWED.

For appellants there was a brief and an oral argument by *Mr. William P. Lord*.

For respondent, Williams Avenue Planing Mill, there was a brief over the names of *Mr. Arthur H. Lewis* and *Messrs. Kollock & Zollinger*, with an oral argument by *Mr. Lewis*.

Opinion by MR. CHIEF JUSTICE MCBRIDE.

1. There is only one question arising upon this application. The section last cited provides that a counter bond may be given in case the judgment or decree appealed from be in "an action or suit upon a contract," and the judgment enforced notwithstanding the appeal. We are of the opinion that a suit to foreclose a mechanic's lien is not a suit upon a contract, but rather a suit to enforce a claim arising by operation of law: *Boisot on Mechanics' Liens*, § 5; *Benbow v. The James Johns*, 56 Or. 554, 560 (108 Pac. 634); *Miner v. Moore*, 53 Tex. 224, 228; *Davis etc. Co. v. Vice et al.*, 15 Ind. App. 117, 119 (43 N. E. 889).

2. It is settled by the case of *Livesley v. Krebs Hop Co.*, 57 Or. 352 (97 Pac. 718, 107 Pac. 460, 112 Pac. 1), that this court has the power to issue a temporary injunction to preserve the *status quo* of property pending an appeal.

The temporary injunction heretofore issued will therefore be continued in force until this cause is finally heard and determined upon appeal.

APPLICATION FOR INJUNCTION ALLOWED.

MR. JUSTICE EAKIN, MR. JUSTICE McNABY and MR. JUSTICE BEAN CONCUR.

Argued September 17, affirmed September 28, rehearing denied October 19, 1915.

ON THE MERITS.

(151 Pac. 733.)

Department 2. Statement by MR. JUSTICE HARRIS.

The defendants E. A. Pearson and Hilma Pearson are husband and wife, and own lots 26, 27 and 28 in block 2, Second Electric Addition, in the City of Portland. The house in which they lived is No. 385 East Fifty-First Street, and is located on lot 27. L. R. Kollock & Co. is a corporation, and is engaged in selling building material. The defendants F. J. Berger and Albert Berger are partners doing business under the firm name of Williams Avenue Planing Mill Company. The Pearsons remodeled their house. Kollock & Co. and the Williams Avenue Planing Mill Company furnished materials for the house, and afterward filed liens to secure the value of the materials supplied. This suit was commenced by Kollock & Co. and resulted in a decree foreclosing the two liens mentioned. E. A. Pearson and Hilma Pearson appealed.

AFFIRMED. REHEARING DENIED.

For appellants there was a brief over the names of *Mr. A. W. Lafferty, Messrs. Powers & Lord* and *Mr. Frank C. Hanley*, with an oral argument by *Mr. Lafferty*.

For respondent there was a brief over the names of *Messrs. Kollock & Zollinger* and *Messrs. Lewis & Lewis*, with oral arguments by *Mr. Arthur H. Lewis* and *Mr. John K. Kollock*.

MR. JUSTICE HARRIS delivered the opinion of the court.

3. The owners of the building admit that Kollock & Co. delivered building material, consisting of laths, plaster, cement and sand; but the Pearsons claim that they have been damaged in the sum of \$200 because the laths were pitchy, causing the walls to become discolored, and that the plaster does not hold to the walls, because it was dead, or warehouse set, when delivered. The laths were delivered in the original packages just as they came from the mill, and were of the quality known to the trade as "clear A." Pearson removed a portion of the laths because he thought some were pitchy and others were not placed far enough apart, and yet he ordered the ones removed to be replaced with the laths of which he now complains. He was living in the house, where he could see the material as it was delivered and as it was placed in the building. The trial court was warranted in holding that the laths were suitable for the purpose for which they were used, especially in the light of the testimony of W. N. Shipley, who did the lathing, and who declared that the material was the same kind as is ordinarily used, and that it was of a very fair quality.

4. The testimony shows that the plaster was manufactured to fill specific orders; that the plaster in question was not made before July 20, 1913; that it arrived in Portland, and went into the warehouse on July 24th, where it remained for about two weeks, when delivery was made to the Pearsons. No valid objection can be made to the kind of material used, because plaster of the same brand has been successfully used in the Northwestern Bank, Morgan, Platt and Jefferson School and other large buildings. A careful reading

of the transcript of testimony leads to the conclusion that the Pearsons themselves were at fault because too much sand was mixed with the plaster. The plaintiff is entitled to a decree foreclosing its lien.

5. The claim made by the Williams Avenue Planing Mill Company is assailed on the following grounds: (1) The person ordering the material was without authority; (2) the materials furnished are not itemized or described in the lien; (3) the land upon which the house is located is erroneously described in the lien; and (4) all the material was not used. E. Lindquist is a carpenter, and was in charge of the work from June until some time in October. The owners admit that Lindquist had authority to order a part of the materials. Lindquist testified that he had charge of the building, and that he ordered all the material purchased from the planing-mill, because the Pearsons told him to do so. Martin Johnson, a carpenter, worked on the house in August, September and October, and he swore that:

“Mr. Pearson told Mr. Lindquist to order all the material that was needed on the job, and then Mrs. Pearson said that my husband is busy, and he will not have time to attend to the orders, so that we will have to leave it to you entirely to do all the ordering for this entire job.”

Mrs. Pearson receipted for most of the disputed materials as the deliveries were made, and the receipts signed by her informed her of the kind and amount of material and that the Williams Avenue Planing Mill Company was making the deliveries. Lindquist had sufficient authority to bind the owners.

6. The lien contained a true statement of the demand, within the meaning of Section 7420, L. O. L., as interpreted by *St. Johns Lumber Co. v. Pritz*, 75 Or.

286 (146 Pac. 483), and *Oregon Lumber & Fuel Co. v. Hall*, 76 Or. 138 (148 Pac. 62), and therefore the second objection made by the owners is without merit. The lien describes the building and land thus:

“That the building to which claimants furnished and delivered said material is a two (2) story frame dwelling-house, No. 385 East Fifty-First Street, constructed upon lot twenty-six (26), block two (2), Second Electric Addition, now in the City of Portland, County of Multnomah, State of Oregon.”

The building is not located on lot 26, but is on lot 27, although the Pearsons are the owners of lots 26, 27 and 28. Nothing but a small chicken-coop was on lot 26. The number of the house is correct, but the description of the lot is incorrect. The block and addition are correctly stated, but the description of the lot, as given in the notice, does not correspond with the designation of the house. If, however, the incorrect description of the lot is rejected, a sufficient description remains to identify the thing intended to be described, because there is enough in the description to enable a party familiar with the locality to identify the premises intended to be described with reasonable certainty: 27 Cyc. 201. The controversy is between the owners and the materialmen, and is unembarrassed by any claims of third persons or innocent purchasers. Measured by the standard fixed in the parallel case of *Harrisburg Lbr. Co. v. Washburn*, 29 Or. 150 (44 Pac. 390), the description of the property is sufficient to support the lien.

7. It is contended that all the material delivered was not used. It appears that some lumber was also purchased from another person, and is referred to as the Henderson lumber. There was no attempt to ascertain, or even approximate, the amount of material

not used, and no effort was made to show whether all or a part of the lumber not used had been purchased from Henderson, or had been delivered by the Williams Avenue Planing Mill Company. The answer failed to allege that any portion of the material had not been used, and the Pearsons have not even made it possible to approximate the quantity of material not used. A materialman has a right to file his claim for the full amount supplied, which it must be presumed was used in the building: *Grants Pass Trust Co. v. Enterprise Min. Co.*, 58 Or. 174 (113 Pac. 859, 34 L. R. A. (N. S.) 395). As said by Mr. Chief Justice MOORE in *Fitch v. Howitt*, 32 Or. 396 (52 Pac. 192):

“It cannot be expected that a materialman would be obliged to watch the progress of a structure, to see that every stick of timber or other material so supplied by him was used therein; and, if the owner would defeat a foreclosure of the lien for the amount demanded, the burden should be cast upon him to allege and prove that some of the material, if the accurate amount thereof was capable of computation in advance, or, if not, that an unreasonable quantity thereof, remained unused after the building was fully completed, or that, without his consent, it had been removed from the building site.”

The decree of the Circuit Court is affirmed.

AFFIRMED. REHEARING DENIED.

MR. CHIEF JUSTICE MOORE, MR. JUSTICE EAKIN and
MR. JUSTICE BEAN CONCUR.

Argued October 4, reversed and decree rendered October 19, 1915.

BURNSIDE v. BURNSIDE.

(151 Pac. 1199.)

From Clatsop: JAMES A. EAKIN, Judge.

Department 1. Statement by MR. CHIEF JUSTICE MOORE.

This is a suit for divorce by Ella Burnside against D. W. Burnside on the ground of desertion, and for the custody of a son two years old when this cause was tried.

The answer denies the material averments of the complaint, and alleges facts designed to show that the husband is entitled to the decree.

The averments of new matter in the answer are denied in the reply, and the cause having been tried, findings of fact and of law were made, based upon which the suit was dismissed, and the defendant appeals.

REVERSED. DECREE RENDERED FOR DEFENDANT.

For appellant there was a brief and an oral argument by *Mr. George C. Fulton*.

For respondent there was a brief and an oral argument by *Mr. A. W. Norblad*.

Opinion by MR. CHIEF JUSTICE MOORE.

It can serve no good purpose to quote from or comment upon the testimony received, a careful perusal of which leads to the conclusion a decree of divorce should have been given to the defendant and that the custody of the minor child should have been awarded

to the plaintiff. It appears from a transcript of the evidence herein that on August 18, 1909, the defendant executed to the plaintiff a warranty deed of certain real property in Clatsop County, Oregon, which deed was duly recorded the following day in Book No. 66 on page 542, records of deeds of that county, and that at the same time the plaintiff executed to the defendant a quitclaim deed of all her interest in and to certain other real property in that county, which deed was duly recorded August 19, 1909, in Book No. 66, at page 541, of the records of deeds of that county, reference being made to the record of such deeds for a specific description of the respective tracts of land. The decree appealed from will therefore be reversed, and one entered here dissolving the bonds of matrimony heretofore and now existing between the plaintiff and the defendant, and the custody of the minor child, Paul F. Burnside, will be awarded to his mother, the plaintiff. The conveyances of the several parcels of real property to the respective parties are hereby confirmed as to the grantee named in each of such deeds, free from any right, title, claim, interest or estate therein or thereto on the part of either in the land of the other. Neither party will be allowed any costs in this court.

REVERSED. DECREE RENDERED FOR DEFENDANT.

MR. JUSTICE BENSON, MR. JUSTICE BURNETT and MR. JUSTICE MCBRIDE concur.

Motion to dismiss appeal denied December 8, 1914.
On the merits, submitted on briefs without argument October 19, 1915.

UNITED STATES NAT. BANK v. SHEFLER.

(143 Pac. 51; 152 Pac. 234.)

ON MOTION TO DISMISS.

Appeal and Error—Notice—Service—"Adverse Parties."

1. Parties who were debtors on a note and against whom a personal judgment was rendered for the amount thereof were not "adverse parties" upon whom a notice must be served of an appeal from such judgment.

Time—Notice of Appeal—Time for Filing—Excluding First or Last Day.

2. Under Section 550, L. O. L., as amended by Laws of 1913, page 617, requiring notice of appeal to be filed within 60 days from the entry of the decree, a notice of appeal from a decree rendered on April 30th, which was filed on June 30th, was filed in time, since the first day, which is to be excluded from the computation under Section 531, was not the day on which the decree was rendered, but the day following.

ON THE MERITS.

Appeal and Error—Omissions from Record—Scope of Review.

3. Where the evidence received at the trial does not accompany the transcript, the only question to be considered is whether the pleadings are sufficient to uphold the decree.

Appeal and Error—Defect of Parties—Waiver.

4. In a suit to foreclose mortgages which had been assigned by the mortgagee, in which defendants pleaded a cancellation of the conveyance by the mortgagee constituting the consideration for one of the mortgages, it could not be objected that the mortgagee was not a party, where no litigant objected to the defect of parties by the filing of a demurrer, or affirmatively pleaded the necessity or propriety of making him a party; his presence not being indispensable.

From Marion: WILLIAM GALLOWAY, Judge.

This is a suit by the United States National Bank, of Salem, Oregon, a corporation, against George C. Shefler and Belle M. Shefler, his wife, Ladd & Bush, a corporation, J. H. Cummings, S. C. Spencer, Beneta R. Stroud, F. J. Eldriedge and Swastika Farms Company, a corporation. From a decree in favor of plaintiff, the defendants, F. J. Eldriedge and Swas-

tika Farms Company, appeal. Respondent moves to dismiss the appeal. MOTION DENIED.

For appellants there was a brief over the names of *Messrs. Conley & De Neffe* and *Dan R. Murphy*.

For respondents there were briefs by *Mr. Henry St. Rayner*, *Messrs. Wilbur & Spencer* and *Mr. George J. Cameron*, *Mr. George C. Bingham* and *Messrs. Carson & Brown*.

In Banc. MR. JUSTICE EAKIN delivered the opinion of the court.

The ground on which this motion is based is that the appeal was not taken within 60 days from the date of the decree, and that service was not made on the Sheflers. Laws of 1913, page 617, amending Section 550, L. O. L., provides, among other things:

“An appeal * * shall be taken by serving and filing the notice of appeal, within 60 days from the entry of the * * decree. * * ”

The decree in this case was rendered April 30, 1914. The notice of appeal was served by mail. In the return of service it does not appear when or where the service was made, except that the affidavit of mailing was sworn to June 29, 1914. Geo. C. Shefler and Belle M. Shefler were not served although they were the debtors on said note, against whom a personal judgment for \$75,000 was rendered in the decree appealed from. The notice, with the return indorsed thereon, was filed June 30th.

1. It is suggested that the Sheflers should have been served with the notice, but they are not adverse parties. There is no modification of the decree that can

be made on the appeal which would affect them adversely, and, as the decree is adverse to them, they have no interest in upholding it.

2. The service of notice having been filed June 30th, it fell within the required time, as it is just 60 days from May 1st to June 30th. In the computation of time within which an act shall be done, the statute provides that the first day shall be excluded and the day on which the act is done shall be included in the count: Section 531, L. O. L. The judgment was rendered April 30th, and within 60 days thereafter the notice of appeal must have been filed. The only question involved is the computation of the time, whether the day on which the judgment was rendered, April 30th, only shall be excluded, or the next day, May 1st, shall be the day excluded. Judge R. S. BEAN, in the case of *Boothe v. Scriber*, 48 Or. 561 (87 Pac. 887, 90 Pac. 1002), held, in computing the time for filing the transcript, that the respondent had all day the fifth day after service of the undertaking in which to except to the sufficiency of the sureties, and that the fifth day is not the day to be excluded from the count of 30 days in which to file the transcript, but the day after shall be the day excluded from the count. The decision in that case has been followed in several cases, such as *Pringle Falls Power Co. v. Patterson*, 65 Or. 474 (128 Pac. 820, 132 Pac. 527), which is a similar case. And in 38 Cyc. 318, where this question is fully discussed, he finally concludes that in most jurisdictions, as a day is an indivisible point of time, the act and the day on which the act is done are coextensive, and that the day on which the act is done will not be the first day to be excluded from the count. In the case of *Vincent v. First Nat. Bank of Newberg*, 76 Or. 579 (143 Pac.

1100), where the same question as the one here was involved, Chief Justice McBride followed the rule laid down in the *Boothe Case*, which we will follow as the safer rule.

The motion to dismiss is denied.

MOTION DENIED.

MR. JUSTICE RAMSEY dissents.

Affirmed October 19, 1915.

ON THE MERITS.

(152 Pac. 234.)

In Banc. Statement by MR. JUSTICE HARRIS.

M. L. Jones conveyed certain real property to George C. Shefler by a deed dated January 31, 1912; and on the same day Shefler gave Jones a note for \$35,000, payable two years after date, which was secured by a mortgage on the land. On April 25, 1912, George C. Shefler and his wife, Belle M. Shefler, gave to Ladd & Bush a note for \$5,000, payable on or before one year after date, and on the same day the payees indorsed the note, without recourse, to M. L. Jones, and on the following day Shefler and his wife secured the note by a second mortgage on the land described in the deed dated January 31, 1912.

The United States National Bank of Salem commenced this suit on February 15, 1914, for the purpose of foreclosing the \$35,000 note and mortgage. The defendants are George C. Shefler, Belle M. Shefler, Ladd & Bush, a corporation, J. H. Cummings, S. C. Spencer, Beneta R. Stroud, F. J. Eldriedge and Swastika

Farms Company, a corporation. The complaint alleges the execution and delivery of the \$35,000 note and mortgage, and that about February 23, 1912, Jones assigned the note and mortgage to the plaintiff, who is now the owner and holder. George C. Shefler, F. J. Eldriedge and Swastika Farms Company filed an answer which alleges that Jones conveyed to Shefler certain real property which was to be held in trust for the use of F. J. Eldriedge, and that such conveyance was the consideration for the \$35,000 note and mortgage; that on July 26, 1912, Jones commenced a suit against Shefler and wife, Eldriedge, Cummings, J. C. Wolfe, and E. P. Lundy, and that the suit terminated in a decree which cancels the deed from Jones to Shefler, and recites that Jones had brought the \$35,000 note and mortgage into court. The answer of Eldriedge and his associates further alleges that Jones is the sole owner of the \$35,000 note and mortgage; that the plaintiff instituted the suit for the benefit of Jones; and that at the time of accepting the transfer of the note and mortgage the plaintiff knew that the conveyance to Shefler constituted the consideration for the note and mortgage.

Ladd & Bush appeared by filing an answer and cross-complaint. This corporation alleges the execution of the \$5,000 note to Ladd & Bush on April 25, 1912, and the indorsement without recourse to Jones; that on April 26, 1912, Shefler and wife secured the note by giving a second mortgage on the land; that afterward Jones indorsed the note to Ladd & Bush; and that he also assigned the mortgage. Shefler, Eldriedge and the Swastika Farms Company answered the pleading filed by Ladd & Bush by alleging that the real property had been transferred to Shefler in trust

for Eldriedge; that the latter applied to Jones for a loan of \$5,000, and as security offered a mortgage to be signed by Shefler; that the loan was made pursuant to the offer, and the money was expended in improving the property which was covered by the mortgage. After referring to the suit commenced by Jones on July 26, 1912, against Shefler and others, the answer recites certain provisions of the decree, and alleges that Jones elected to assail the conveyance to Shefler; that Ladd & Bush had notice of such election when it accepted the transfer of the note and mortgage, and knew that the court could not annul the title held by Shefler without first canceling the note and mortgage. The affirmative defenses to the note and mortgages were placed in issue by appropriate replies. After a trial the Circuit Court rendered a decree foreclosing both mortgages, and also granting relief to defendants S. C. Spencer and Beneta R. Stroud. An appeal was prosecuted by F. J. Eldriedge and the Swastika Farms Company.

Submitted on briefs without argument under the proviso of Supreme Court Rule 18: 56 Or. 622 (117 Pac. xi).

AFFIRMED.

For appellants there was a brief submitted over the names of *Mr. George G. Bingham, Mr. George J. Cameron, Mr. Dan R. Murphy, Messrs. Conley & De Neffe, Messrs. Brodie & Swett, Mr. E. E. Heckbert, Messrs. Wilbur & Spencer and Mr. Henry St. Rayner.*

For respondent there was a brief over the name of *Messrs. Carson & Brown.*

MR. JUSTICE HARRIS delivered the opinion of the court.

3, 4. The evidence received at the trial does not accompany the transcript, and therefore the only question to be considered is whether or not the pleadings are sufficient to uphold the decree: *Howe v. Patterson*, 5 Or. 353; *Wyatt v. Wyatt*, 31 Or. 531 (49 Pac. 855); *Morrison's Estate*, 48 Or. 612 (87 Pac. 1043); *Scott v. Smith*, 58 Or. 591 (115 Pac. 969); *Matthews v. Matthews*, 60 Or. 451 (19 Pac. 766); *Neal v. Roach*, 61 Or. 513 (107 Pac. 475); *O'Connor v. Towey*, 70 Or. 399 (140 Pac. 625). The decree is amply sustained by the pleadings; and, furthermore, the assignments of error do not contain any grievance arising out of the sufficiency of the pleadings, although complaint is made because M. L. Jones was not made a party to the suit. No litigant objected to a defect of parties by the filing of a demurrer; no defendant affirmatively pleaded the need or propriety of making Jones a party; the presence of Jones was not indispensable; and therefore the appellants cannot now insist that Jones should have been impleaded: *Osborn v. Logus*, 28 Or. 302 (37 Pac. 456, 38 Pac. 190, 42 Pac. 997); *Cooper v. Thomason*, 30 Or. 177 (45 Pac. 295); *Thompson v. Hibbs*, 45 Or. 141 (76 Pac. 778); *Sevier v. Mitchell*, 72 Or. 483 (142 Pac. 780).

The real purpose of the defenses interposed against the notes and mortgages was to compel the plaintiff and Ladd & Bush to stand in the shoes of Jones. As revealed by the printed abstract, the trial court found from the evidence that both the plaintiff and Ladd & Bush purchased the notes and mortgages for a valuable consideration without notice of any infirmities. The suit commenced by Jones on July 26, 1912, ter-

minated in a decree which was reviewed by this court on appeal, and the deed to Shefler was canceled: *Jones v. Shefler*, 77 Or. 284 (151 Pac. 463). Referring to the \$35,000 note, we stated that:

“Jones cannot have both the land and the \$35,000 note signed by Shefler. If for any reason the note has been reduced to a judgment, Jones must cause it to be satisfied immediately upon the filing of the mandate in the Circuit Court. If the note has not been transformed into a judgment, Jones must at once cause the note to be canceled and surrendered. If Jones is not willing to comply with the conditions imposed, the conveyance to Shefler will not be disturbed, because as between Eldridge and Shefler a court of equity will leave the controversy where it was first found.”

Concerning the \$5,000 note we said that:

“Shefler kept at least \$1,000 of the \$5,000 borrowed from Ladd & Bush, and Eldridge used the remainder for improvements. Shefler should not be permitted to profit from the transaction. Except as to the \$1,000 retained by Shefler and not used for improvements, the \$5,000 note and mortgage should be taken care of by Jones.”

It will be noted that the decree in *Jones v. Shefler*, 77 Or. 284 (151 Pac. 463), adjudicates the rights and equities of the interested parties and provides for every contingency. The decree of the Circuit Court in the instant case is affirmed; but it must be understood that this decree does not in any way modify or limit the directions contained in *Jones v. Shefler*, 77 Or. 284 (151 Pac. 463).

AFFIRMED.

Argued October 13, writ dismissed October 19, 1915.

STATE ex REL. v. LIGHTNER.

(152 Pac. 232.)

Highways—Road Districts—Statutes—Amendment—Setting Out Provision.

1. Laws of 1915, page 133, chapter 127, Section 1, amended Section 6313, L. O. L., and made imperative the Constitution of every incorporated city and town as a separate road district. Laws of 1915, page 255, chapter 194, subsequently enacted, without mention of Chapter 127, amended the same statute in other respects, but left such action discretionary, and set out the statute after the words "so as to read as follows." *Held*, that it was an entire obliteration of the former statute, Chapter 127 being repealed whether in conflict with Chapter 194 or not, so that action under Chapter 127 could not be enforced, as the omitted provisions could not be revived by judicial interpretation, since to so add an omitted provision would violate Article IV, Section 22, of the Constitution, requiring the amended law to be set forth at length.

Original proceeding in Supreme Court.

Mandamus proceeding by the state, on relation of William F. Brady against W. L. Lightner, Rufus Holman and Philo Holbrook, as the board of commissioners of Multnomah County. WRIT DISMISSED.

For the plaintiff there were oral arguments by *Mr. George M. Brown*, Attorney General, and *Mr. Walter H. Evans*, District Attorney.

For defendants there were oral arguments by *Mr. Elmer E. Coovert* and *Mr. Richard W. Montague*.

In Banc. MR. JUSTICE BEAN delivered the opinion of the court.

The relator seeks by this proceeding in *mandamus* to compel the county commissioners to constitute the City of Portland a separate road district, pursuant to Section 6313, L. O. L., as amended by Section 1 of Chapter 127, page 133, General Laws of Oregon, 1915,

The commissioners declined to take action, on the ground that that section, as amended by a later act of the same session (Chapter 194, page 255), gives the board authority to divide the county into "suitable and convenient road districts," without any limitation as to their extent. An alternative writ was issued to which defendants have shown cause by general demurrer. The sole question before the court is which of these acts is in effect.

The first of the acts of 1915 mentioned (Chapter 127) was filed in the office of the Secretary of State February 23, 1915, at 8:30 o'clock A. M., and bears the title:

"An act to amend Section 6313 of Lord's Oregon Laws as amended by Chapter 122 of the General Laws of 1913 and Section 6320 of Lord's Oregon Laws."

Section 1 of this act provides:

"That Section 6313 of Lord's Oregon Laws as amended by Chapter 122 of the General Laws of 1913, be and the same is hereby amended so as to read as follows: Sec. 6313. The County Courts of the several counties of this state shall, as often as they may deem necessary, but no oftener than once each year, divide their respective counties, or any part thereof, into suitable and convenient road districts, each of which shall be numbered, and cause a brief description of the same to be entered upon the county records. Each County Court, at the October term thereof, 1915, shall so arrange the road districts of the county, as to conform to the provisions of this section, and at the October term of said court every year thereafter, and at no other term, make such changes in the road districts of the county as may be deemed necessary; provided, that all road districts formed under the provisions of this act shall be formed of contiguous territory; provided, further, that every incorporated city and town

shall constitute a separate road district, and the County Court shall not have authority to divide such territory or include any of it in any other road district."

Section 2 amends Section 6320, L. O. L., with which we are not here concerned.

Chapter 194, page 255, Laws of 1915, which was introduced, passed, signed by the Governor, and filed in the office of the Secretary of State February 23, 1915, at 9:55 o'clock A. M., after Chapter 127, amended by law of 1913 by substituting the September for the October term and omitting the proviso requiring incorporated cities to be constituted into separate road districts. The title reads:

"An act to amend Section 6313 of Lord's Oregon Laws, as amended by Chapter 122 of the General Laws of Oregon of 1913."

Section 1 thereof enacts:

"That Section 6313 of Lord's Oregon Laws as amended by Chapter 122 of the General Laws of Oregon of 1913 be and the same is hereby amended so as to read as follows: Sec. 6313. The County Courts of the several counties of this state shall, as often as they may deem necessary, but no oftener than once a year, divide their respective counties or any part thereof into suitable and convenient road districts, each of which shall be numbered, and cause a brief description of the same to be entered upon the county records. Each County Court at the September term thereof, 1915, shall so arrange the road districts of the county as to conform to the provisions of this section, and at the September term of said court every year thereafter and at no other term make such changes in the road districts of the county as may be deemed necessary: Provided, that all road districts formed under the provisions of this act shall be formed from contiguous territory."

1. Original jurisdiction of this court is invoked on account of the importance of the question at issue and the effect of the construction contended for by the relator upon road building in Multnomah and other counties of the state, and the urgent necessity of an immediate decision. It is the contention of the relator that Chapter 127 of the Laws of 1915 is in full force and effect, and that the two chapters are inconsistent only as to the time when the County Court shall act. Where two acts are conflicting, the later expression of the legislative will must prevail. It is stated in Lewis' Sutherland Statutory Construction, volume 1, Section 247, page 463, as follows:

"The repugnancy being ascertained, the later act or provision in date or position has full force, and displaces by repeal whatever in the precedent law is inconsistent with it. Subsequent legislation repeals previous inconsistent legislation whether it expressly declares such repeal or not."

See *Whitfield v. Davies*, 78 Wash. 256 (138 Pac. 883); *Metsker v. Whitesell*, 181 Ind. 126 (103 N. E. 1078, 1083); *Detroit Ry. v. Barnes*, 172 Mich. 586 (138 N. W. 211), overruling *Detroit Ry. v. Barnes*, 149 Mich. 675 (113 N. W. 285).

Chapter 127, the first act, purporting to amend Section 6313, is superseded by the second act as far as there is any difference, because the Constitution requires that the act revised or section amended shall be set forth at length in the amendatory act. If there is anything to be added to Section 6313 as set forth in the last amendatory act, the Constitution is thereby violated. The prevailing act is necessarily, therefore, the whole of Section 6313: Art. IV, Section 22, of the Constitution of Oregon. The title of the first act is sufficient to support it only as an amendment of Sec-

tion 6313, and not an independent act: Art. IV, Section 20, of the Constitution. Amendment of an act or section by setting it out in full "so as to read as follows" operates as an entire obliteration of the former act after the new one goes into effect: *Flanders v. Multnomah County*, 43 Or. 583 (73 Pac. 1042); *Metsker v. Whitesell*, 181 Ind. 126 (103 N. E. 1078, 1083); *Columbia Wire Co. v. Boyce*, 104 Fed. 172 (44 C. C. A. 588); *Heinze v. Butte*, 107 Fed. 165 (46 C. C. A. 219); *McDermott v. Nassau, etc.* 85 Hun, 422 (32 N. Y. Supp. 884). The omitted provisions cannot be revived by judicial construction: *State ex rel. v. Simon*, 20 Or. 365 (26 Pac. 170). Amendment by reference to the section number of an act which has been previously amended, without mention of the last amendatory act, is valid: *Whitfield v. Davies*, 78 Wash. 256 (138 Pac. 883); *Brewer v. Pittsburg*, 91 Kan. 910 (139 Pac. 418); *Columbia Wire Co. v. Boyce*, 104 Fed. 172 (44 C. C. A. 588); *Heinze v. Butte*, 107 Fed. 165 (46 C. C. A. 219). In *State ex rel. v. Simon*, 20 Or. 368, 26 Pac. 170, it was announced by former Mr. Justice BEAN thus:

"The rule seems to be that statutes and parts of statutes, omitted from a revision, are to be considered annulled, and cannot be revived by construction. They cannot be read into the latter statute so as to restrict its operation, and this, although it seems likely that the omissions were unintentional: *Endlich, Int. of Stat.*, §§ 202, 384; *Woodbury v. Berry*, 18 Ohio St. 456."

In *Metsker v. Whitesell*, 181 Ind. 126, 140 (103 N. E. 1078, 1083), the court speaks as follows:

"Is the act of March 14, 1913, in effect? We have here not simply the question of an implied repeal by repugnant provisions. Each of the acts of March 14th and 15th, respectively, purport to amend the same sec-

tion of the highway law so as 'to read as follows,' and the reading of the two acts is radically different. Both acts cannot be in effect, for there is but one section numbered 62, and it can read only one way: *Draper v. Falley*, 33 Ind. 465; *Detroit etc. R. Co. v. Barnes Paper Co.*, 172 Mich. 586 (138 N. W. 211). Section 21, Article IV, of our Constitution provides that, in amending or revising an act, the act, as revised or amended, shall be set forth at full length."

It is settled by the great weight of authority that the act amended, being the last expression of the legislature, is the law. The two are different, and have profoundly different consequences. They prescribe contradictory times for the performance of the acts, and one leaves with the county commissioners a discretion which the other takes away. To add anything to the prevailing act by construction would be a flagrant violation of the constitutional provision that the amendatory act shall set out the section amended "at length." If it can be made larger by a proviso which the court selects for itself out of a previous amendment on the same subject, it is not set forth at length, and the constitutional provision would be violated. If the Constitution is given any effect, Section 6313 as last amended is all of Section 6313 as it now stands. There can be but one Section 6313 of Lord's Oregon Laws. If the first amendment as passed in 1913, and the last amendment, Chapter 194, had passed just as it reads no one would have contended that the proviso making separate road districts out of cities omitted in the last amendment should be read into it or tacked on to it. The first, having passed at the same session, but prior to the second, does not, in any way, avoid or modify the application of the constitutional inhibition. It might have been different if the first amendment in-

stead of being an attempted amendment of Section 6313, had been an original law without reference to an amendment, but it is not. It is an attempted amendment of Section 6313: *Detroit Ry. v. Barnes*, 172 Mich. 586 (138 N. W. 211).

We do not have to deal necessarily with the question of a repeal by implication. The later act expressly amends the section as it formerly existed and repeals a part of the former statute, and must be declared to be the law until the legislative branch of our state government ordains otherwise.

It follows that the demurrer to the writ should be sustained and the writ dismissed; and it is so ordered.

WRIT DISMISSED.

Argued October 14, reversed October 19, 1915.

MOLL v. ROTH CO.*

(152 Pac. 235.)

Bills and Notes—Presentment and Notice—Waiver.

1. Section 5915, L. O. L., provides, relative to negotiable instruments, that presentment for payment is dispensed with by waiver of presentment express or implied. Section 5942 provides that notice of dishonor may be waived either before the time of giving notice has arrived or after the omission to give due notice, and the waiver may be express or implied. An indorser of a note agreed with the indorsee to look after the collection of the note, and subsequently prepared a notice to the maker to pay the note, which the indorsee signed and mailed to the maker. On the day the note became due the maker telephoned to the indorsee that he was not then able to pay it, and the indorsee called the indorser on the telephone, and the indorser consented that the maker should be given further time. *Held*, that it was the indorser's duty to carry out its undertaking, and, if anything was omitted, it had no cause to complain, and by its acts it waived presentment and notice of nonpayment.

[As to waiver of right to demand and notice on part of indorser, see note in 57 *Am. Dec.* 665.]

*On the subject of implied waiver of presentment and notice by indorser before maturity, see note in 33 *L. R. A. (N. S.)* 639.

On right to show by parol evidence that indorsement unrestricted in form was made for purpose of collection only, see note in 17 *L. R. A. (N. S.)* 838.

REPORTER.

Evidence—Parol Evidence to Vary Writing.

2. When any fact or transaction exists which raises an equity between an indorser and an indorsee and shows it to be inequitable to enforce the written contract, there arises an exception to the general rule that parol evidence will not be admitted to vary the contract of a blank indorsement.

Bills and Notes—Presentment and Notice—Waiver.

3. An agreement at or before the maturity of a note that an extension of time shall be given is a sufficient circumstance or fact to authorize an inference of waiver of presentment and notice of nonpayment.

Bills and Notes—Presentment and Notice—Waiver.

4. Any act, course of conduct, or language of an indorser calculated to induce the holder of a note not to make demand or protest or to give notice or to put him off his guard or any agreement to that effect will dispense with the necessity of taking such steps.

Bills and Notes—Presentment and Notice—Waiver.

5. The contingent liability of an indorser of a note is changed into a fixed liability by waiver of demand and notice.

Evidence—Parol Evidence to Vary Writing.

6. An agreement by an indorser of a note to attend to its collection for the indorsee was not in conflict with or contradiction of the written blank indorsement, where it was shown that this obligation was a subsequent transaction.

[As to parol evidence to add to or vary writing, see note in 56 Am. St. Rep. 659.]

Trial—Reception of Evidence—Offer of Proof.

7. In an action by an indorsee of a note against the indorser, a corporation, the indorsee was asked to relate what occurred between him and S., the secretary of the corporation, in reference to the note to which question an objection was sustained. Plaintiff then offered to prove that at the time of the indorsement and delivery of the note there was an arrangement between the corporation and himself whereby it assumed the duty of looking after the collection and payment of the note; that later plaintiff made a similar arrangement with defendant's officer, and the officer wrote out a notice to the maker of the note, which plaintiff signed and mailed; that on the day the note became due the maker telephoned to plaintiff that he was not able to pay it, and plaintiff called the officer of the corporation on the telephone, who consented that the maker should be given further time. *Held*, that it was clear that S. was the officer of the corporation referred to with whom the arrangement was made.

Corporations—Officers—Authority.

8. As a corporation can act only through its agents, the authority and power of the managing officers of the corporation in the aggregate are coextensive with those of the corporation itself.

Corporations—Officers—Authority.

9. An officer or agent may act for and bind a corporation within the scope of the authority conferred upon him, either expressly or impliedly.

From Marion: PERCY R. KELLY, Judge.

Department 2. Statement by MR. JUSTICE BEAN.

This is an action by E. O. Moll against the Roth Company, as indorser upon a promissory note. The trial court granted a judgment of nonsuit and plaintiff appeals.

The complaint sets forth in substance:

"That on or about the 23d day of February, 1912, one C. C. Hickok, for value received, executed and delivered to the defendant his promissory note, wherein and whereby he promised and agreed to pay to the order of the said defendant (at Ladd & Bush, Bankers, Salem, Oregon) the sum of \$350, with interest thereon at the rate of 8 per cent per annum from said date until paid, and wherein he further promised and agreed to pay to the said defendant, in case suit or action should be instituted to collect said note, or any portion thereof, such additional sum as the court might adjudge reasonable as attorney's fees in said suit or action; * * that the said defendant, for and in consideration of the sum of \$350 to it paid by the plaintiff, duly indorsed and transferred and delivered the said promissory note to the plaintiff long before the same became due and payable, and the plaintiff is now, and ever since has been, the holder and owner of the said promissory note; that at the time of the indorsement of said note to the plaintiff the defendant orally agreed to be absolutely responsible and liable upon said note to the plaintiff and to pay the same, in any event, if such note or any part thereof was not paid by the said maker thereof at maturity, and the said defendant agreed to attend to the collection of said note from the maker thereof, and pursuant to such agreement undertook to collect the said note from the said maker, and, through the plaintiff, notified the said maker, C. C. Hickok, a short time before the maturity of said note, to pay said note at the Capital National Bank of Salem, Oregon, and said defendant prepared such notice to

said maker to pay as aforesaid, and then informed the plaintiff that said maker would probably not be able to pay said note just at maturity, but would be able to pay later, and the plaintiff, pursuant to such agreement, and with the defendant's agreement and consent, left the said note at the Capital National Bank of Salem, Oregon, and the same was there presented for payment to said maker on August 23, 1912, and the said note was not then paid nor any part thereof, and the plaintiff on the next following day, namely, on August 24, 1912, duly notified the said defendant that said note was not paid nor any part thereof, and that the maker thereof, C. C. Hickok, had just then informed the plaintiff that he (said Hickok) could not then pay the said note, and requested further time on said note until he sold his prune crop, and this plaintiff then asked said defendant if it would consent and agree to the forbearance of the enforcement of said note and the said defendant then informed the plaintiff that it consented and agreed to forbearance in the enforcement of the payment of said note at that time, and the said defendant by its said agreements and conduct waived its right to the presentment of said note to the maker for payment at Ladd & Bush, Bankers, Salem, Oregon, and notice of nonpayment thereafter, and the plaintiff relied upon the said agreements and conduct of the defendant, and was thereby induced to not present said note for payment to said maker at said Ladd & Bush, Bankers, and to not notify said defendant of nonpayment thereafter, and the said defendant by reason of its said agreements and conduct ought to be and is estopped from alleging that the said note was not duly presented on the day of maturity to the maker at said Ladd & Bush, Bankers, and notice thereafter was not duly given of the nonpayment of said note to the defendant; and that the said defendant by its said agreements and conduct waived any further presentment and demand, other than as herein set forth, and also waived all notice of nonpayment of said note, and agreed to be absolutely responsible and liable upon said note to the plaintiff in any event, if such note or

any part thereof was not paid by the said maker thereof when the same was due and payable.”

It is also alleged that \$75 is a reasonable attorney's fee, and that the note has not been paid, nor any part thereof, except \$14 interest.

The defendant by its answer admits the execution and indorsement of the note, and denies the other allegations of the complaint. Upon the trial the plaintiff called E. Schunke as a witness. He testified, in substance, that he was at the date of the trial secretary of the defendant corporation, and had served in that capacity ever since it was organized, and that he was empowered and authorized by the defendant, among other things, to indorse and deliver promissory notes held by the corporation, and that he had indorsed on its behalf the note described in the amended complaint and delivered the same to the plaintiff long prior to its maturity. The plaintiff, as a witness on his own behalf, stated, in effect, that he is and has been for a long time a meat packer and butcher in West Salem, Polk County, Oregon, and had furnished meats, etc., to the defendant; that in the spring of 1912 the corporation was indebted to him in the sum of \$150 or \$160 for meats, etc., and that the defendant indorsed and delivered the said note to him in payment of the said account, and plaintiff gave to defendant his check for \$200 or thereabouts in payment of the difference between the amount of the note and the account. In order to prove the matters contained in the third paragraph of the complaint relating to presentment and notice plaintiff's counsel asked him upon direct examination the following question:

“Q. Now, Mr. Moll, just relate what occurred between you and Mr. Schunke at that time in reference to this note.”

The defendant objected upon the ground that it was incompetent because the transfer of the note is made by indorsement, and the contract between the parties is in writing and cannot be varied by parol evidence. The court sustained the objection, and the plaintiff duly excepted to such ruling, and the witness was not permitted to answer the question. Thereupon counsel for plaintiff stated to the court that the plaintiff proposed to prove, and did duly offer to prove, by the witness E. O. Moll, the following facts: That at the time of the indorsement and delivery of the note in question to him there was an arrangement made between the defendant and himself whereby the former assumed the duty of looking after the collection and payment of the note and the amount of diligence that it would be necessary for plaintiff to exercise. Later the defendant's officer met plaintiff and had a similar arrangement and wrote out a notice to the maker of the note. Plaintiff signed it and mailed it. On the day the note became due the maker telephoned in to plaintiff to the effect that he was not then able to pay it, but hoped to do so within a short time upon selling his crop of prunes. To that plaintiff replied that it would be all right if the defendant would consent. The latter was called up by telephone by the plaintiff, who submitted the maker's proposition, and the officer of the corporation assented thereto, and consented that the maker of the note should be given further time.

REVERSED.

For appellant there was a brief with oral arguments by *Mr. John A. Carson* and *Mr. John Bayne*.

For respondent there was a brief and an oral argument by *Mr. Walter C. Winslow*.

MR. JUSTICE BEAN delivered the opinion of the court.

1-5. The question for determination is as to the waiver of presentment and notice of nonpayment. Our negotiable instruments law provides that presentment for payment is dispensed with by waiver of presentment, express or implied: Section 5915, L. O. L.; Crawford, Neg. Inst., p. 107, notes. Notice of dishonor may be waived either before the time of giving notice has arrived or after the omission to give due notice, and the waiver may be express or implied: Section 5942, L. O. L. When any fact or transaction exists which raises an equity between the indorser and indorsee and shows it to be inequitable to enforce the written contract, there arises an exception to the general rule that parol evidence will not be admitted to vary the contract of a blank indorsement: *Dale v. Gear*, 38 Conn. 16 (9 Am. Rep. 353); *Jones v. Albee*, 70 Ill. 37; 7 Cyc. 1124. An agreement at or before maturity of the note that an extension of time shall be given is a sufficient circumstance or fact to authorize an inference of waiver: Daniel, Neg. Inst. (4 ed.), § 1106; *Sheldon v. Horton*, 43 N. Y. 93 (3 Am. Rep. 669); *Amoskeag Bank v. Moore*, 37 N. H. 539 (75 Am. Dec. 156); *Ridgway v. Day*, 13 Pa. 208. Any act, course of conduct, or language of the indorser calculated to induce the holder not to make demand or protest or give notice, or to put him off his guard, or any agreement to that effect, will dispense with the necessity of taking such steps: Daniel, Neg. Inst. (4 ed.), § 1103; *Boyd v. Bank of Toledo*, 32 Ohio St. 526 (30 Am. Rep. 624); *Torbert v. Montague*, 38 Colo. 325 (87 Pac. 1145); *Taunton Bank v. Richardson*, 5 Pick. (Mass.) 436; *Yeager v. Farwell*, 13 Wall. 6 (20 L. Ed. 476). The contingent

liability of an indorser is changed into a fixed liability by waiver of demand and notice: *Amoskeag Bank v. Moore*, 37 N. H. 539 (75 Am. Dec. 156).

“A waiver must be made by one having the capacity to incur obligations, but, inasmuch as notice left with a clerk or party in charge of an indorser’s place of business is sufficient, it follows that a waiver by a person so in charge is effective”: 7 Cyc. 1124.

6. It appears that plaintiff resided in the country, and it was proper for him to engage someone who was so situated as to be able to look after the collection of the note. When the defendant agreed to do this and entered upon that duty and prepared the notice to Hickok, the maker, the natural result was for plaintiff to believe that everything necessary in the premises would be done. Such arrangement would undoubtedly cause him to refrain from placing the note in a bank or in some person’s hands in order that presentment for payment be made and notice of dishonor be given. Under these circumstances it was the duty of defendant to carry out the undertaking according to its agreement, and, if anything was omitted, it has no cause to complain. This arrangement was not in conflict with or in contradiction of the written indorsement in blank upon the note. The plaintiff tendered proof to show that the obligation of defendant to assume the collection of the note was a subsequent transaction. The time of payment of the note was extended pursuant to the suggestion of defendant. The evidence produced and tendered plainly shows that the defendant waived presentment and notice of nonpayment of the note: *Robinson v. Holmes*, 57 Or. 5 (109 Pac. 754).

7. It is urged by counsel for defendant that it was not shown who the officer of defendant was with whom

the dealings were had, or that he had authority to bind the corporation. It is clear, however, from the record, that plaintiff referred to Mr. E. Schunke, the secretary of the company during all the time of the transaction between plaintiff and defendant, and that he was empowered by the latter to indorse and deliver notes "and such things" for defendant, and had so indorsed the note in question; in fact, this authority was admitted by defendant upon the trial. This proof was not challenged in any way. The objection of defendant to the proof tendered did not cover this point.

8, 9. Since a corporation can act only through its agents, the authority and power of the managing officers of the corporation in the aggregate are coextensive with those of the corporation itself. An officer or agent may act for and bind the corporation within the scope of the authority conferred upon him either expressly or impliedly: 21 Am. & Eng. Ency. (2 ed.), 852.

The lower court erred in granting the nonsuit. The evidence in the case is all contained in the record, and it appears therefrom that under the provisions of our negotiable instruments law the evidence tendered should have been admitted, and the cause submitted to the jury.

The judgment of the Circuit Court is reversed and the cause remanded for a new trial. REVERSED.

MR. CHIEF JUSTICE MOORE, MR. JUSTICE EAKIN and
MR. JUSTICE HARRIS CONCUR.

Submitted on briefs September 29, reversed October 19, 1915.

FARMERS' STATE BANK v. WEST.*

(152 Pac. 238.)

Bills and Notes—Bona Fide Purchaser—Evidence.

1. Evidence in an action on a note *held* sufficient to go to the jury on the issue whether plaintiff was a holder in due course by transfer from the payee, who obtained it from defendant by fraud.

[As to who is a *bona fide* holder of a bill or note, see notes in 9 Am. Dec. 272; 44 Am. Dec. 698.]

From Columbia; JAMES U. CAMPBELL, Judge.

In Banc. Statement by MR. JUSTICE EAKIN.

This is an action by the Farmers' State Bank, a corporation, against Burt West to recover upon a promissory note, of which the following is a copy:

"\$250.00. September 6, 1912.

"January 1, 1913, after date, I, we, or either of us, promise to pay to the order of self at the — the sum of two hundred and fifty no/100 dollars, for value received, with interest at the rate of ~~eight per cent~~ per annum until paid, together with reasonable attorney's fees in case payment is not made at maturity. The makers and indorsers hereby waive presentment, demand, protest, and notice of nonpayment, and the benefit of any law intended for the advantage or protection of the obligor.

"Address —. Number 932.

"BURT WEST."

The complaint alleges that after the making and execution of said promissory note, and prior to said date of January 1, 1913, the said defendant, Burt West, for value and by the indorsement of his name on the back of said note, assigned and transferred it to one Emery,

*As to what circumstances are sufficient to put a purchaser of negotiable paper on inquiry, see notes in 29 L. E. A. (N. S.) 351; 49 L. E. A. (N. S.) 395.

who immediately transferred said note to the plaintiff herein. No allegation appears in the complaint that plaintiff paid anything for said note.

The answer admits the making of the note and the delivery thereof to one Emery, but denies that the same was given for any consideration, that the plaintiff is the owner of said note, or that the same was ever assigned to it, alleging the fact to be that the plaintiff acquired said note in bad faith, with full notice of the facts and circumstances under which the same was made, and that said plaintiff bank knew, and with the exercise of reasonable care and diligence would have known, that said note was not a valid obligation, but was void for fraud in its inception, was given without any consideration, and was obtained by misrepresentation and deceit, as hereinafter stated. The answer then by proper allegations sets up that the note was given to one Emery to pay for 25 shares of stock in the Co-operative Supply Company, a corporation, doing business in the City of Portland, by means of which stock Emery represented defendant would be enabled to obtain supplies at reduced prices; that it had a stock on hand worth about \$3,000,000; that Emery made many golden-hued representations as to the value of said stock and the advantages which would accrue to defendant by its purchase, agreeing to hold said note until it became due, and, if defendant was not satisfied, that his note would be returned to him; that defendant, believing and relying on said representations, made said note. He further alleges that said representations were false, in that said Co-operative Supply Company did not have a stock of \$3,000,000, or any greater amount than \$2,000 or \$3,000; that he could not get supplies at reduced prices, or at any price, nor was the company able to earn its stock-

holders anything whatever; that it was dishonestly conducted and had failed in business, the stock being utterly valueless. These allegations were denied in the reply. On the trial the cashier of the bank testified that he knew Mr. Emery by seeing him around for a week or two, and that he was canvassing among the farmers for stock; that witness knew nothing about the Co-operative Supply Company or its officers; that he did know Emery's address, but did not think it worth while to have him indorse the note; that he knew West, but had never done business with him; that Emery told him West did not want to pay interest, so that was scratched out. He admitted he had a telephone in the bank, and West had one in his house, but asserted he had never talked with West about the note, and, so far as he knew, West did not know that the bank had it until about two weeks before the note became due. He explained that he talked with Emery about the matter a few days before he bought the note; that he bought other notes from Emery, but in none of the others was the interest erased. The defendant, Burt West, and witness Alexander Young testified to matters tending to show the misrepresentation and fraud in obtaining said note; that the note was not to be delivered until after West could investigate, and he could get it back by returning the stock at any time before January 1, 1913. This was not disputed. At the conclusion of the testimony, on motion of the plaintiff, the court directed a verdict in its favor.

Submitted on briefs without argument under the proviso of Supreme Court Rule 18: 56 Or. 622 (117 Pac. xi).

REVERSED.

For appellant there was a brief over the names of *Mr. M. E. Miller* and *Mr. Frederic H. Whitfield*.

For respondent there was a brief submitted by *Mr. William B. Dillard* and *Mr. Joseph W. Day*.

MR. JUSTICE EAKIN delivered the opinion of the court.

Section 5885, L. O. L. (Negotiable Instruments Act), declares that a holder in due course is, *inter alia*, a holder who has taken under the condition that it is complete and regular upon its face.

Section 5958 provides:

"Any alteration which changes * * the sum payable, either * * principal or interest, * * is a material alteration."

In *Mahaiwe Bank v. Douglas*, 31 Conn. 181, a case where the instrument had been changed, and the bank was claiming as an innocent holder in due course, the Supreme Court of Connecticut said:

"Any material alteration in a bill after it is complete, made without consent of the parties whose names are on it, releases them, * * whether such alteration would operate to their prejudice or not."

This court further held in this same case that, notwithstanding the erasures, unmistakable evidence of the original character of the instrument remained, and that it was amply sufficient to excite distrust and make it the duty of anyone to whom the paper was offered to inquire when, by whom, and by what authority such erasures and alterations had been made. This case is quoted with approval in *Angle v. Northwestern Mutual Life Ins. Co.*, 92 U. S. 340 (23 L. Ed. 556):

"A person who takes a bill which upon the face of it was dishonored cannot be allowed to claim the privileges which belong to a *bona fide* holder without notice": *Andrew v. Pond*, 13 Pet. 79 (10 L. Ed. 61).

"The evidence showed that the check in suit had been changed before it reached the plaintiff, and that a mere inspection of the check showed such change. There is no evidence showing that the defendant authorized or assented to the alteration, but the appellant says that he is 'a holder in due course,' and not a party to the alteration, and that, under Section 205 of the negotiable instruments law, * * he may enforce payment on the check according to its original tenor. Section 91, page 732, of the negotiable instruments law states what constitutes a holder in due course. According to that section, a holder in due course is a holder who has taken an instrument that is complete and regular on its face. This instrument was not complete and regular on its face at the time plaintiff took it. As we have stated before, a mere inspection of the instrument showed its defect, and therefore, under subdivision 41 of the negotiable instruments law, plaintiff had notice of an infirmity in the instrument at the time he took it": *Elias v. Whitney*, 50 Misc. Rep. 326 (98 N. Y. Supp. 667).

The alteration of the note in this action was made by authority of the defendant, but the plaintiff took it with only the explanation of Emery, whom he very slightly knew, when the alteration was vital if unauthorized. Notice may be actual or it may be inferred from facts proved. The cashier knew that Emery was selling stock in a concern of which he knew nothing to farmers in the vicinity. This would give at least an inference that he knew what was the consideration of the note. There were other circumstances, on which we will not comment as the case must go back for re-trial, from which reasonable men might infer notice.

Under the facts and the law, we think there was enough in the case to have been submitted to the jury.

The judgment is reversed and a new trial granted.

REVERSED.

MR. JUSTICE HARRIS concurs in the result.

Argued October 4, reversed October 19, 1915.

RAPP v. MULTNOMAH COUNTY.

(152 Pac. 243.)

Counties—Actions.

1. Where the plaintiff sues under the Employers' Liability Act (Laws 1911, p. 16) for personal injuries sustained while an employee of the county, his action is one of tort resting on negligence and will not be heard, as the county can be sued only under Section 358, L. O. L., which permits suits against a county on its contracts only.

[As to liability of state as employer within Employers' Liability Act, see note in *Ann. Cas.* 1914B, 889.]

Counties—Liability for Torts—Statute—Implied Repeal.

2. Section 358, L. O. L., which limits actions against a county to causes founded on contract, is not repealed or amended by implication by the Employers' Liability Act, which fails explicitly to mention counties, since repeals by implication are not favored.

Constitutional Law—Judicial Functions—Matters of Policy.

3. Where the legislature failed to include counties in the operation of the Employers' Liability Act, the courts will not apply the act to actions against them, although as a matter of policy the law ought so to be applied.

From Multnomah; WILLIAM N. GATENS, Judge.

Department 1. Statement by MR. JUSTICE BURNETT.

The plaintiff, Charles Rapp, was employed by Multnomah County in repairing the approach to a ferry maintained by the county across the Willamette River at Sellwood. He alleges that the task in hand consisted in excavating and grading for the purpose of receiving mudsills on which to lay the planking for the

approach, and, while he was digging, a team driven by another employee came along near the pit in which he was at work, and one of the horses fell, striking the plaintiff, and inflicting an injury for which he would recover damages. It is charged in substance that the injury was caused by the negligent way in which the team was managed, and that the work could have been carried on with safety by requiring the teamster to keep away from close proximity to the plaintiff. A demurrer to the complaint was overruled. The defendant answered, denying the negligence and the injuries averred, and interposed the defenses of contributory negligence, negligence of a fellow-servant, and assumption of risk.

The answer was traversed by the reply. There was a judgment of \$100 for the plaintiff, and the defendant appealed.

REVERSED.

For appellant there was a brief over the names of *Mr. Samuel H. Pierce*, *Mr. Walter H. Evans*, District Attorney, and *Mr. Arthur A. Murphy*, Deputy District Attorney, with an oral argument by *Mr. Pierce*.

For respondent there was a brief over the names of *Mr. Isham N. Smith*, *Mr. Lon L. Parker* and *Mr. Richard Talboy*, with an oral argument by *Mr. Smith*.

MR. JUSTICE BURNETT delivered the opinion of the court.

1. It is necessary only to consider the pivotal question in this case. It is whether or not the Employers' Liability Act (Laws 1911, p. 16) applies to counties in this state. The plaintiff declares under the last clause of Section 1 of the act, reading thus:

“And generally, all owners, contractors, or subcontractors, and other persons having charge of, or responsible for, any work involving a risk or danger to the employees or the public, shall use every device, care and precaution which it is practicable to use for the protection and safety of life and limb, limited only by the necessity for preserving the efficiency of the structure, machine, or other apparatus or device, and without regard to the additional cost of suitable material or safety appliance and devices.”

The earlier part of the section lays its injunction upon “all owners, contractors, subcontractors, corporations or persons whatsoever engaged in the construction, repairing, alteration, removal or painting of any building, bridge, viaduct or other structure.”

A statutory duty is imposed upon the persons and corporations included within the purview of this statute. Although a plaintiff may be in the employ of those controlled by the law at the time of receiving an injury, his right to recover does not depend upon the contract of employment which the parties have made. It rests solely upon the legislative mandate the violation of which is a tort and not a breach of the contract. The law is not affected by the contract and a disobedience of the statute is not an infraction of the agreement. The instant case is an action for tort.

Section 358, L. O. L., says:

“An action may be maintained against any of the organized counties of this state upon a contract made by such county in its corporate character, and within the scope of its authority, and not otherwise.”

These are plain words, and exclude an action for tort, unless the right to maintain the same can be derived from the Employers' Liability Act. It is the settled rule in this state that neither the state itself,

nor one of its counties, which are but instrumentalities of the state in exercise of its sovereignty, can be sued, unless upon express permission given by the legislative power in the form of a statute permitting the same. Public policy forbids that the state shall be made a defendant in litigation without its consent, and as counties are regarded as parts of the government the exemption is in good reason also extended to them, unless a statute exists expressly allowing the maintenance of actions against them. The right of action cannot be grounded upon mere implication. The state does not promulgate its own laws against itself or against its governmental subordinates, unless it is so directly declared by the legislative power of the state. A statute imposing a new liability, where otherwise none would exist, must be construed strictly: *McFerrer v. Umatilla Co.*, 27 Or. 311 (40 Pac. 1013); *Jones v. Union Co.*, 63 Or. 566 (127 Pac. 781, 42 L. R. A. (N. S.) 1035, and note).

2. Moreover, repeals or amendments by mere implication are not favored, and Section 358, L. O. L., in limiting actions against a county to causes founded only upon a contract and "not otherwise," cannot be held to be repealed or amended by mere inference under the Employers' Liability Act, which does not explicitly mention counties as within its scope. This rule is supported by the following authorities: *Lewis' Sutherland*, Statutory Construction (2 ed.), § 514; *Templeton v. Linn Co.*, 22 Or. 315 (29 Pac. 795, 15 L. R. A. 730); *Seton v. Hoyt*, 34 Or. 266 (55 Pac. 967, 75 Am. St. Rep. 641, 43 L. R. A. 634); *Schroeder v. Multnomah County*, 45 Or. 96 (76 Pac. 772). The *Seton-Hoyt Case* was treating of the liability of a county for interest on a claim against it. Mr. Chief Justice WOLVERTON used this language:

“Nor is the state within the purview of a general law regulating the rate of interest upon money due or to become due, and this goes upon the ground that a sovereign is not bound by the words of a statute unless it is expressly named [citing authorities]. That the county is but the agent or instrumentality of the state, constituted and employed essentially for the promotion of its general government, and therefore subject to like rules and restrictions governing its liabilities as of the state, there can be no controversy.”

3. Much was said at the argument to the effect that the county ought to provide for the safety of its employees like any other employer, but this constitutes only moral obligation, and until the legislative power grants permission to sue a county, which is one of the state's governmental instrumentalities, the mere ethical duty cannot be recognized by the judiciary. The county was not amenable to this action. It was error to overrule the demurrer to the complaint.

The judgment of the Circuit Court is reversed.

REVERSED.

MR. CHIEF JUSTICE MOORE, MR. JUSTICE McBRIDE and
MR. JUSTICE BENSON CONCUR.

Argued September 29, affirmed October 19, 1915.

**MACKAY v. COMMISSION OF THE PORT OF
TOLEDO.**

(152 Pac. 250.)

Master and Servant—Employers' Liability Act—Scope—Injuries.

1. Employers' Liability Act (Laws 1911, p. 16), Section 1, requiring all persons having charge of or responsible for any work involving danger to the employee to use every device and precaution practicable for the safety of life and limb, the final clause of which declares that generally all owners or contractors having charge of

such work shall use such devices, etc., is not restricted to the particular persons mentioned in the first part of the section, but extends the scope of the statute to all persons having charge of or responsible for any work involving risk or danger to employees.

[As to what is "accident arising out of and in course of employment" under Employers' Liability Act, see note in *Ann. Cas.* 1914D, 1284.]

Master and Servant—Question for Jury—Dangerous Work.

2. Under such act the question whether the work involved a danger is one of fact to be determined by the jury, rather than a question of law.

Municipal Corporations—Action—Governmental or Ministerial Duty—Improvement of River—"Other Public Corporations."

3. Under Section 358, L. O. L., providing that an action may be maintained against any county and against any of the other public corporations mentioned in Section 357, in its corporate character and within the scope of its authority, or for an injury arising from some act or omission of such other public corporation, a municipal corporation designated a port, organized under Sections 6114-6125, L. O. L., is within the class of "the other public corporations," and in the execution of the actual work of improving a public highway, a river, was liable for injury to an employee from the breaking of an old, worn ladder furnished as part of the equipment of a dredger.

Master and Servant—Employers' Liability Act—Employers Liable—Municipal Corporation.

4. A municipal corporation designated a port, incorporated under Sections 6114-6125, L. O. L., and liable at common law for injury to employees while engaged in actual ministerial work, was subject to the provisions of the Employers' Liability Act.

Trial—Requested Instructions—Given Instructions.

5. Requested instructions, which, so far as applicable, were fully covered by the instructions given, were properly refused.

Appeal and Error—Harmless Error—Admission of Evidence.

6. In an action by an employee against a municipal corporation designated a port, to recover for personal injury from the breaking of a defective ladder, error, if any, in admitting evidence that after plaintiff went to work on the dredger one of the port commissioners told him that one R. was his boss and to do whatever he told him to do, was harmless, since the action fell within the scope of the Employers' Liability Act, and the port would be bound by the acts or directions of the foreman of the work.

Trial—Instructions—Assuming Facts.

7. In such action an instruction that, if plaintiff was entitled to a verdict, the jury should assess damages sustained by reason of the injury, with the right to consider the pain and suffering already undergone and the future suffering, the loss of earning capacity, and should determine the sum which would compensate him for his injury, was not objectionable as assuming any fact.

From Lincoln: LAWRENCE T. HARRIS, Judge.

Department 2. Statement by MR. JUSTICE BENSON.

This is an action by William Mackay against the Commission of the Port of Toledo, a corporation for damages for personal injuries. Defendant is a corporation organized under and pursuant to the provisions of Sections 6114 to 6125, inclusive, L. O. L.

The complaint alleges, in substance, that defendant at the time of the alleged injuries owned and operated near Toledo, in Lincoln County, a certain dredger used in deepening the rivers and bays in said vicinity; that on said date, and some time prior thereto, plaintiff was employed by defendant on and about said dredger; that the work involved a risk or danger to him as an employee and was a hazardous occupation; that while he was so employed defendant and its duly authorized agent on April 19, 1913, ordered him to prepare the dredger for operation on April 21, 1913, to fill the boiler by connecting the same by means of a hose with a hydrant on the dock at which the dredger rested, and to start a fire in the engine-room thereof; that at the proper time for performing these duties the dredger was about ten feet below the hydrant from which he was expected to procure the water for filling the boiler; that defendant provided him with a hose and ladder with which to reach the hydrant; that he placed the ladder in a careful and prudent manner and climbed the same for the purpose of examining the threads on the nozzle of the hydrant in order to determine which end of the hose to carry up; that the ladder was defective, in that it was old, worn, and one side thereof was broken and shorter than the other; that the deck of the dredger was wet and slippery; that without any negligence on his part the ladder slipped and fell, throwing him against an iron chock which was

a permanent fixture upon the deck of the dredger, thereby causing the injury of which he complains. There are other allegations tending to bring the action within the provisions of the Employers' Liability Act.

The defendant answered, denying generally the allegations of the complaint, and pleading affirmatively that defendant is a corporation organized and acting exclusively for governmental purposes and the public good, and without profit to itself or anyone else; that at all times since organization it has been employed in improving the channel of the Yaquina River and its tributaries for purposes of navigation, for the public good, and without profit; that any injuries received by plaintiff were so received while defendant was using the dredger for such governmental purposes; that plaintiff was employed at the time as a watchman only, for the purpose of guarding the dredger from injury by fire or otherwise; that defendant had provided a boat for the purpose of enabling its employees to go to and from the dredger to the dock, which constituted a safe and efficient means therefor; that the ladder whereby plaintiff was hurt was placed upon the dredger by the plaintiff and his coemployees without the knowledge or consent of defendant, and was used by plaintiff and his fellow-servants for the sole purpose of accommodating their personal wishes and desires. Then follow allegations of contributory negligence and assumption of risk. A demurrer was interposed to the first affirmative defense, which sets up the contention that defendant was a municipal corporation at the time of the alleged injury employed in widening and deepening the channel of the Yaquina River and its tributaries as a public and governmental duty, and therefore not liable for acts of negligence. The demurrer was sustained, and a reply was filed

consisting of a general denial. From a judgment for plaintiff, this appeal is taken. AFFIRMED.

For appellant there was a brief over the names of *Messrs. Weatherford & Weatherford* and *Messrs. Hawkins & McClusky*, with an oral argument by *Mr. James K. Weatherford*.

For respondent there was a brief over the names of *Messrs. McFadden & Clarke* and *Mr. J. F. Stewart*, with an oral argument by *Mr. Arthur Clarke*.

MR. JUSTICE BENSON delivered the opinion of the court.

We shall consider the various assignments of error in the same order in which they are discussed in appellant's brief.

1. Assignment numbered 10 involves a construction of the Employers' Liability Act (Laws 1911, p. 16), since defendant contends that climbing a ladder does not involve the use of machinery or any of the enumerated employments mentioned in Section 1 of the law, and that therefore the acts complained of do not fall within the scope of the statute, and that it was entitled to the directed verdict for which it asked. Attention has been directed so frequently to the final clause of Section 1 of the Employers' Liability Act that it would seem to be unnecessary to reiterate its terms; but for the purpose of this discussion we may say that it reads thus:

“And generally, all owners, contractors or subcontractors and other persons having charge of, or responsible for, any work involving a risk or danger to the employees or the public, shall use every device, care and precaution which it is practicable to use for the protection and safety of life and limb, limited only

by the necessity for preserving the efficiency of the structure, machine or other apparatus or device, and without regard to the additional cost of suitable material or safety appliance and devices."

Commenting upon this clause, in the case of *Davis v. Carlton Lumber Co.*, 77 Or. 441 (151 Pac. 652), Mr. Justice BEAN says:

"It may now be regarded as settled by the decisions of this court that the general clause of the law quoted above is not restricted to the particular persons and acts mentioned in the first part of the section, but that it amplifies the scope of the statute, by extending its injunction to all persons having charge of or responsible for any work involving a risk or danger to the employees or the public."

2. The question as to whether or not the work involved a risk or danger is one of fact, to be determined by the jury, rather than a question of law, and we are not at liberty to disturb their finding thereon.

3. We come next to a consideration of the demurrer to defendant's first affirmative answer, pleading exemption from liability by reason of the fact that it is a municipal corporation and was engaged in governmental functions at the time of the alleged injury. Section 358, L. O. L., reads thus:

"An action may be maintained against any of the organized counties of this state upon a contract made by such county in its corporate character, and within the scope of its authority, and not otherwise; and an action may be maintained against any of the other public corporations in this state mentioned in Section 357, in its corporate character, and within the scope of its authority, or for an injury to the rights of the plaintiff arising from some act or omission of such other public corporation."

It must be conceded that defendant is a municipal corporation and in the class of "the other public corporations" mentioned in the statute just quoted which the law permits to be sued in their corporate character for an injury to the rights of a plaintiff arising from its acts or omissions. As to such corporations the courts have undertaken to make a distinction between such acts as are governmental or, in a sense, judicial, upon the one hand, and such as are ministerial or for the sole benefit of the corporation, upon the other. This distinction, while clear, is difficult of definition in general terms, and must be determined largely upon the facts of the individual case. In this case, however, the decisions of this court have rendered our task less difficult than would have been possible without such clear and apt statements of the law. In the case of *Wagner v. Portland*, 40 Or. 389 (60 Pac. 985, 67 Pac. 300), Mr. Justice WOLVERTON says:

"But the case at bar is distinguishable from any of those cases, or any that we have been able to find applying the doctrine referred to therein. Here the city was acting in the discharge of a legal duty to repair the fire-alarm system, and the case is one of common employment for the performance of a special service for and in behalf of the city. The duty was being performed through the instrumentality of private or corporate agencies, and not through the fire department or its officers, or through officers of the city whose duty it was to perform such work; and it might be added that the work of repairing was an act ministerial in its nature. In a similar case (*Mulcairns v. City of Janesville*, 67 Wis. 24 (29 N. W. 565), where the city was engaged in the construction of a cistern for the use of the fire department, and an employee was injured through the negligence of other employees, it was held that the city was liable, under the doctrine of *respondeat superior*; so in *McCaughey v. Tripp*, 12

R. I. 449, where an employee was injured while the City of Providence was engaged in the construction of a city hall: See, also, *Donahoe v. City of Kansas City*, 136 Mo. 657 (38 S. W. 571); *City of Toledo v. Cone*, 41 Ohio St. 149. From these latter authorities we are impelled to the conclusion that corporate liability exists in the case at bar, and that the further and separate defense of nonliability was therefore properly stricken out."

Again in the case of *Giaconi v. Astoria*, 60 Or. 12 (113 Pac. 855, 118 Pac. 180), in the original opinion, written by Mr. Justice MOORE, we find the following language:

"A municipal corporation, in devising plans for improving public highways within its borders, acts judicially, and when proceeding in good faith is not liable for errors of judgment; but in constructing the work it acts ministerially, and is bound to see that the plan is executed in a reasonably safe and skillful manner."

And further in the same opinion it is reiterated thus:

"The execution of the plan is a ministerial service, and for any negligent performance thereof liability attaches."

In the opinion upon rehearing of the same case we find Mr. Justice BURNETT emphasizing the same doctrine and supporting it with abundant authority. In the case at bar we find a municipal corporation improving a public highway, the Yaquina River, and engaged in the actual execution of the work. It follows that the demurrer was properly sustained.

4. In this connection there has been some discussion as to whether or not such a public corporation is subject to the provisions of the Employers' Liability Act.

It seems clear to us, however, that if it is amenable to a common-law liability, as is held in the cases cited, it must logically follow that it is liable under a statute so comprehensive in its scope as the one to which reference is made. In the case of *Josupect v. City of Niagara Falls*, 70 Misc. Rep. 638 (127 N. Y. Supp. 527), the court says:

“If it be the individual duty of the municipality to keep the streets in repair and in condition for travel, it must employ men for that purpose, and it must exercise toward them the same care for their safety of life and limb as individual employers are bound to exercise toward their employees. We can see no reason why a municipality should not be held to the same care for the safety of its employees as an individual, nor why all the provisions of the Employers’ Liability Act (Consol. Laws, c. 31, §§ 200–204) should not apply to cities equally as to private corporations or individuals—employers of labor. The act makes no exceptions in favor of municipalities, and considerations of public policy require none should be made by judicial construction or decision.”

The same doctrine is declared in 5 Labatt’s Master & Servant, Section 1666.

5. Considering assignments of error numbered 4 and 5, it is sufficient to say that, so far as the requested instructions were pertinent and applicable, they were fully covered by the instructions which the court gave.

6. Assignments numbered 1 and 2 are to the effect that the court erred in permitting the plaintiff to testify over objection, that after he went to work on the dredger he had a conversation with Clarke Copeland, one of the port commissioners, in which the latter said to him: “Dave Ross is your boss. Do whatever he tells you to.” If there was any error in admitting this testimony, it was harmless, since, if this action falls

within the scope of the Employers' Liability Act, and we think it does, the corporation would be bound by the acts or directions of the foreman of the work, and there was ample evidence that Ross was such foreman, in charge of the dredger, and directing the "deck hand" as to what he wanted done.

7. The last point for our consideration is defendant's objection to instruction numbered 32, given by the court as follows:

"If you find that the plaintiff is entitled to a verdict it will be then your duty to assess the damages plaintiff has sustained by reason of the injury, and you have the right when assessing the damages to take into consideration the bodily pain and suffering that plaintiff has already undergone and will hereafter suffer on account of the injuries received, also the loss of power to perform labor and duties which he would be called upon to perform in his condition in life and the impairment of his capacity to earn money, and if, after considering all these elements of damages, you conclude that the plaintiff is entitled to recover, it is your duty to determine the sum that, in your judgment, will compensate plaintiff for injuries he received, not exceeding the amount asked for in the complaint."

The instruction does not, so far as we can discover, assume any fact, but leaves it entirely to the jury to determine. It may be noted that the same instruction has been approved by this court in the case of *Doyle v. Southern Pac. Co.*, 56 Or. 495 (108 Pac. 201).

Finding no substantial error in the record, the judgment of the lower court is affirmed. **AFFIRMED.**

MR. JUSTICE McBRIDE and MR. JUSTICE BEAN concur.

MR. CHIEF JUSTICE MOORE dissenting.

Argued September 27, affirmed October 19, 1915.

WILLIS v. HORTICULTURAL FIRE RELIEF.*

(152 Pac. 259.)

Appeal and Error—Evidence—Motions to Strike—Necessity.

1. Where an answer was not responsive to a question, the injured party must move to strike it, or the matter cannot be reviewed.

Witnesses—Error in Evidence—Correction.

2. Where a witness, in an action on a fire policy who had signed the proofs of loss, made a mistake either in his computations or his testimony, another witness may account for the mistake, if the first cannot be recalled.

[As to when concealment or misrepresentation avoids fire policy, see note in 35 Am. Rep. 629.]

Witnesses—Examination—Scope.

3. In an action on a fire policy, where the insured, who signed the proofs of loss, was, on cross-examination, asked if the adjuster called his attention to the fact he enumerated 81 iron bedsteads, and it appeared that there had been a mistake in computations, it is proper to allow the insured on redirect examination to testify that the adjuster did not suggest he refresh his memory as to the number of iron bedsteads destroyed by inspecting the ruins, even though it is not the duty of the adjuster to aid the insurer in making proofs of loss.

Evidence—Opinion Evidence—Expert Testimony.

4. An experienced furniture dealer who had inspected in a store a stock of furniture insured is competent to testify as to its value and that it was worth the amount of the policy, where the invoices were destroyed.

[As to when the opinions of nonexperts are admissible, see note in 30 Am. St. Rep. 38.]

Insurance—Fire Policies—Actions—Evidence.

5. In an action on a fire policy where it was contended that false statements in the proofs of loss avoided the policy and precluded recovery, the question whether the statements were intentionally false so as to prevent recovery held, under the evidence, for the jury.

Insurance—Fire Policies—Proofs of Loss.

6. Where a fire policy provided that any false statements or false swearing by the insured relating to the insurance or subject matter before or after loss should avoid the policy, unintentional false statements in the proofs of loss will not preclude recovery.

From Lake: HENRY L. BENSON, Judge.

*As to effect of false swearing in proofs of loss, see note in 32 L. R. A. (N. S.) 453. REPORTER.

Department 1. Statement by MR. CHIEF JUSTICE MOORE.

This is an action by Richard Willis and E. R. Willis, partners as Willis Furniture Company, against the Horticultural Fire Relief of Oregon, to recover upon two insurance policies \$6,000 for the loss of and the damage to a stock of furniture, etc., by fire which occurred at Lakeview, Oregon, February 5, 1912. The complaint is in the usual form, and alleges that all the insured property was totally destroyed, except five pieces of furniture of the value of \$70, thereby entailing a loss of \$7,200.

As special defenses the answer charges that the property involved was purposely burned by the plaintiffs, and that they made willfully false sworn statements in their proof of loss.

The reply converted the allegations of new matter in the answer, and the cause, being tried, resulted in a judgment for the plaintiffs in the sum stated, and the defendant appeals.

AFFIRMED.

For appellant there was a brief over the names of *Mr. John Bayne* and *Mr. L. F. Conn*, with an oral argument by *Mr. Bayne*.

For respondents there was a brief over the names of *Messrs. Thompson & Rutenic* and *Mr. Joseph S. Kent*, with oral arguments by *Mr. W. Lair Thompson* and *Mr. J. C. Rutenic*.

Opinion by MR. CHIEF JUSTICE MOORE.

1. The plaintiff E. R. Willis testified that the plaintiff Richard Willis had some experience in the furniture business before forming the present partnership,

but that no purchases of stock had been made by him prior to their engaging in business at Lakeview, Oregon, and he was asked:

“At the time of your taking this inventory, December, 1911, did you note his ability to give prices or cost of articles?”

An objection to this inquiry having been overruled and an exception allowed, the witness answered:

“Well, he did not have any cost marks on the articles, but always stated that it cost about this, and about that, and he never knew how many of an article he had, or how much an article cost exactly, and that is the reason why I was anxious.”

It is argued that, since Richard Willis subscribed his name and made affidavit to the proof of loss, wherein untrue statements were made as to the total destruction of the entire property when some articles of furniture were but slightly damaged, in which writing he willfully misrepresented the value of the stock burned, the question so objected to, when permitted to be answered, over exception, tended to show that, because he had no knowledge gained by observation, and for that reason was unable correctly to give the number of articles of furniture destroyed or to state the price thereof, his statement, though untrue, was, by reason of his inexperience, not willfully false. It will be noted that the answer which should have been given by E. R. Willis was “Yes” or “No.” In overruling the objection to the inquiry, the court could not reasonably have anticipated that the reply would not have been responsive to the question. Under such circumstances, after the answer had been given, defendant’s counsel should have moved to strike it out, but, not having done so, the error assigned is unavailing.

2. Any witness may possibly make a mistake in undertaking in court to detail the facts which he has perceived, but if he discovers the error or his attention is called to it before the trial is closed, and he means to be honest he ought to correct the fault, and should be given an opportunity carefully to explain how it occurred, thus leaving the jury to determine whether or not the false statement was knowingly made. Another person who knows how such mistake arose should be permitted to account for it, if the witness who committed the error cannot be recalled. The court adopted this course, allowing the testimony of another witness to be given, and in doing so no error was committed.

At a former hearing of this cause in the lower court Richard Willis gave testimony which was transcribed, and, in the absence of that witness, received in evidence at the trial herein. If a motion had been made by defendant's counsel to exclude such part of that evidence as related to the values of goods destroyed by fire, on the ground that the witness was inexperienced, and by reason thereof unable to express an opinion on the subject, and had the supposed motion been denied, an exception taken and properly incorporated in the bill, the action of the court in that particular could have been reviewed. Since such supposed course of procedure was not pursued, it is unnecessary to consider the question discussed in the brief as to whether or not the senior partner was qualified by experience or observation to give an estimate of the worth of such goods.

3. From the transcript of Richard Willis' testimony it appears that on redirect examination, in referring

to the insurance adjuster, the plaintiffs' counsel inquired:

"At the time you gave this proof of loss and these affidavits, the making of these affidavits, Mr. Willis, or at any time, when the question of the number of bedsteads destroyed by fire come up, did Mr. Ratcliffe suggest to you that you could aid your memory by looking over the ruins and counting the iron bedsteads?"

An objection to this question was overruled and an exception allowed, whereupon the witness replied: "He did not, sir." It is contended by the defendant's counsel that it was not incumbent upon the insurance adjuster to aid the insured in preparing their evidence, and, this being so, the answer of the witness tends to impose upon the defendant's representative blame for the false statement in the proof of loss. Prior to the giving of the answer last objected to, defendant's counsel, on cross-examining this witness, asked:

"Is it not a fact Mr. Willis, at the time you gave this list, your attention was called to the fact that you had enumerated 81 iron bedsteads?"

He replied: "No, sir." From this question it would seem to be implied that, as Mr. Ratcliffe was present when the list of property burned was made out, he had suggested to Richard Willis a proper manner of determining the number of bedsteads destroyed by the fire. While it was not the duty of the adjuster, who was the defendant's agent, to aid the plaintiffs in making out their proof of loss, it was proper to permit the witness on redirect examination to testify as indicated, in order to refute any inference that might have been created in the minds of the jurors by the question asked on cross-examination.

The transcript referred to further shows that in alluding to a duplicate invoice of a stock of goods belonging to a decedent's estate Richard Willis was asked by his counsel:

"Was your attention called by the insurance adjuster to the existence of this copy?"

An objection to the inquiry having been overruled and an exception allowed, the witness answered:

"There was a copy. It may possibly been one that the administrator used when Mr. Colvin died. He had a few accounts, but I bought them out, and in a book in the drawer, which I quite frequently come across, and it made plain there was an inventory of the stock, but it might have been as to the administration after Mr. Colvin's death. They made an inventory, and that was in the drawer there, or one of them."

It will be seen that this reply was not responsive to the question, and, as no motion was made to strike out the answer, the alleged error is not properly raised.

4. William Wallace, as plaintiffs' witness, testified that for about three years prior to the trial herein he had theretofore been a furniture dealer at Lakeview, Oregon, and that during the time the plaintiffs were engaged in such business in that city he had called at their store several times, the last occasion being about a week before the fire, and, referring to the stock then seen in the building, he said: "I would have taken it at a lump at \$6,000." It further appears from the testimony of this witness that he sold his furniture business to a Mr. Chandler, who transferred it to a Mr. Colvin, and the latter having died, an administrator of the decedent's estate sold the stock to the plaintiffs. Mr. Wallace was then asked: "Now, what was the value of the goods you sold to Chandler?"

Over objection and exception, he replied: "It was forty-two hundred and some dollars, was the invoice of my stock." This witness, in answer to the inquiry as to how the stock of goods which he sold to Chandler compared with the plaintiffs' supply of furniture, etc., testified, over objections and exception, that he thought their stock was greater.

It is maintained that errors were committed in receiving such testimony. The experience of Mr. Wallace as a furniture dealer was undoubtedly sufficient, after an inspection of the stock, to enable him to express an intelligent opinion as to its value. Unpacked furniture offered for sale is not like the class of goods that are kept on shelves in boxes, no fair estimate of the value of which can be made without careful inspection. A dealer in household goods who knows the general invoice prices thereof is competent, from an inspection of the stock displayed, to estimate its value. When a witness has some knowledge on which to base an opinion as to the value of property, his testimony is competent; the weight to be given to it being a question for the jury: *Elliott, Ev.*, § 685; *Ruckman v. Imbler Lumber Co.*, 42 Or. 231 (70 Pac. 811); *Brown v. Truax*, 58 Or. 572 (115 Pac. 597); *Tucker v. Colonial Fire Ins. Co.*, 58 W. Va. 30 (51 S. E. 86).

It was incumbent upon the plaintiffs to offer the best evidence they could produce, and, since their bills and invoices of goods were burned it was competent for them to introduce testimony tending to show the extent and worth of another stock of furniture, a comparison of which with the magnitude of the property destroyed by fire might enable the jury to estimate the measure of loss. No error was committed in this respect.

5. A clause in the contracts of insurance involved in the case at bar reads:

"This entire policy shall be void if the insured has concealed or misrepresented, in writing or otherwise, any material facts or circumstances concerning this insurance or the subject thereof, or if the interests of the insured be not truly stated herein, or in case of any fraud or false swearing by the insured touching any matter relating to this insurance, or the subject thereof, whether before or after a loss."

The answer alleges that in making out the written proofs of loss, which were verified by the plaintiff Richard Willis, he falsely stated that the property insured was totally destroyed by fire, when five pieces of furniture were saved; that he knowingly declared upon oath the number of iron and brass bedsteads destroyed to be 81, when there were only 32 such pieces in the building when it was burned; and that he also stated in the same manner the value of the property lost was \$9,168.97, when as a witness at the trial he admitted that the worth of the goods destroyed was only \$7,223. The defendant's counsel, having introduced evidence in support of these issues, moved the court for a directed verdict in favor of his client, but, the motion having been denied, it is insisted that an error was thereby committed.

The evidence shows that ten days after the fire, and before the proofs of loss were made out, Miss Laura Duke, a stenographer, took in shorthand the oral statements of Richard Willis as to the amount of the property destroyed. These notes having been extended the next day, a sentence in the transcript thereof reads:

"I saved one or two pieces of furniture that were burned afterward."

This plaintiff as a witness, referring to a part of the sentence "that were burned afterward," testified as follows:

"I would say about that, that it was either taken down wrong, or a mistake."

In answer to the question, "Are you certain that you gave those pieces that were saved before you made your proof of loss?" this witness, alluding to a conversation he had with the insurance adjuster relating to the property which escaped the fire, replied:

"I told him of the articles saved, and asked him what I was to do with them. He said I claimed my loss was greater than the insurance, and I could do what I pleased with them."

At the trial the complaint, by leave of court, was amended so as to state the articles of furniture thus saved, but in a damaged condition, and to give the value thereof.

Mrs. Laura Hickerson, née Duke, as plaintiffs' witness, testified that she could not produce her stenographic notes of the declarations made in her hearing by Richard Willis, because she had delivered them to the insurance adjuster. In referring to her ability correctly to read the notes at the time they were made, she stated upon oath that she could not properly transcribe the memoranda, because she had not done any work of that kind for two years prior thereto, and that in copying the notes she had difficulty, and put in the transcript whatever words she thought should be included.

The proof states a destruction of property value at \$9,168.97, while Richard Willis testified that the worth of such property was only \$7,223. In explaining this discrepancy he stated upon oath that immedi-

ately after the fire he informed the insurance adjuster, and at all times thereafter declared to him, that the value of the property burned was \$7,223, as disclosed by an inventory of the stock of goods, taken a few weeks prior to the fire. This plaintiff further deposed that from memory he was unable to give a list of the articles destroyed, and that, to the best of his recollection, the larger sum appended to the schedule of property was written after he had subscribed his name thereto.

The proof of loss declares that 81 bedsteads valued at \$451 were burned, though Richard Willis testified that at the time of the fire there were not so many in the building, the worth of that class of property being only \$227; that he arrived at such figures by adding to the worth of the bedsteads given in the inventory the value of like property received after such schedule was made and deducting from that sum the worth of bedsteads sold, thus leaving \$227 as the value at the time of the fire, which estimate he gave to the adjuster, who desired a detailed list of the different kinds of such property and their respective values, in compliance with which three grades of bedsteads were given and the worth thereof, but in making up the proof of loss, the numbers and values of the classes last given were inadvertently added to the original estimate as made.

The foregoing statement on this branch of the case is deemed to be a fair epitome of the testimony given by the plaintiffs in explanation of the inconsistencies referred to. From such showing it is believed the questions involved were not so free from doubt that the court could say, as a matter of law, that no recovery could be had on the policies by reason of the alleged

false statements, and that in submitting the entire matter to the jury for their determination no error was committed.

6. The court in its charge referred to the clause of the policies whereby the contract of insurance was to be rendered invalid by misrepresentation on the part of the plaintiffs of any material facts concerning the insurance or the subject thereof, and said:

“The untrue statement, in order to avoid the policy, must have been knowingly and intentionally made by the insured, with knowledge of its falsity.”

An exception having been taken by defendant's counsel to the language quoted, it is contended that an error was committed in thus instructing the jury.

“Mere falsity of a sworn statement,” says an author, “is not sufficient to avoid the policy, if not made with intent to defraud; the false swearing which voids the insurance must be done willfully and knowingly and with intent to defraud the company”: 1 Clement, Fire Ins., 275.

In *Clafin v. Commonwealth Ins. Co.*, 110 U. S. 81, 95 (28 L. Ed. 76, 3 Sup. Ct. Rep. 507, 515), Mr. Justice MATTHEWS in discussing this subject remarks:

“A false answer as to any matter of fact material to the inquiry, knowingly and willfully made, with intent to deceive the insurer, would be fraudulent: If it accomplished its result, it would be fraud effected; if it failed, it would be a fraud attempted. And if the matter were material and the statement false, to the knowledge of the party making it, and willfully made, the intention to deceive the insurer would be necessarily implied, for the law presumes every man to intend the natural consequences of his acts.”

In a former trial of this cause Mr. Justice EAKIN, speaking on this question, says:

“We leave out of account any consideration of false swearing in ignorance of the facts or by mistake which would not avoid the policy”: *Willis v. Horticultural Fire Relief*, 69 Or. 293, 299 (137 Pac. 761, Ann. Cas. 1916A, 449).

To the same effect, see *Ward v. Queen City Ins. Co.*, 69 Or. 347, 351, (138 Pac. 1067); *Parker v. Amazon Ins. Co.*, 34 Wis. 363, 371; *Waldeck v. Springfield F. & M. Ins. Co.*, 53 Wis. 129, 131 (10 N. W. 88).

If the plaintiffs erroneously stated in their proof of loss certain facts as to the quantity or value of the property destroyed, without any fraudulent intent to defraud the defendant, they were properly permitted to explain, at the trial, how the mistake occurred in order that the jury might determine whether or not a dishonest motive might reasonably have been inferred from their written false declaration. The instruction complained of was proper, and no error was committed in giving it.

An exception was taken to the following instruction:

“If you find from the evidence in this case that the plaintiffs made an erroneous proof of loss to defendant, but that the errors therein were not made intentionally, and you do not find that the plaintiffs set the fire that caused the loss, or procured the same to be done, then you must render a verdict for the plaintiffs.”

The language here complained of is so nearly consonant with the part of the charge already considered that a discussion thereof is not deemed necessary.

Exceptions were taken to other instructions that were given and to the refusal of the court to charge as requested. These matters have been carefully examined and are deemed unimportant.

It follows that the judgment should be affirmed, and it is so ordered.

AFFIRMED.

MR. JUSTICE BEAN, MR. JUSTICE BURNETT and MR. JUSTICE McBRIDE concur.

Argued September 21, reversed October 22, 1915.

INGRAM v. CARLTON LUMBER CO.

(152 Pac. 256.)

Release—Pleading—Fraud.

1. In a servant's action for injury under the Employers' Liability Act (Laws 1911, p. 16), where the answer traversed the allegations of negligence and affirmatively alleged that plaintiff had made a claim against defendant, that defendant had paid plaintiff \$150, and that plaintiff released defendant from all demands, a reply alleging defendant's representation of payment for lost time and that plaintiff accepted the payment and signed a document which he believed was a receipt for payment for lost time, that its contents were never explained to him to be in complete satisfaction, and that it was procured by misrepresentation, was insufficient to charge defendant's fraud, as it did not state that the document was the release relied upon by defendant, or by whom the information was given to plaintiff, or any duty of the defendant to explain the document.

[As to contracts by servants waiving right to recover for injuries which may be received in course of their employment, see note in 3 Am. St. Rep. 255.]

Damages—Personal Injury—Lost Time.

2. Lost time resulting from a servant's injury, together with the deprivation of wages, constitutes an element of damages recoverable in his action under the Employers' Liability Act.

Action—Splitting Cause of Action.

3. A party is not allowed to split his cause of action, but all the elements of damages relied upon must be included in one complaint.

Release—Release of One Joint Tort-feasor—Effect.

4. The release of one joint tort-feasor releases all.

Trial—Instructions—Pleadings.

5. In a servant's action for injury, where plaintiff claimed that a release set up by defendant had been procured by fraud, but did not plead that the relation of attorney and client existed or was pre-

tended by defendant to exist between plaintiff and the person procuring the release, an instruction on the theory that such relation existed was erroneous, and not in conformity with the pleadings.

Release—Validity—Representation by Attorney.

6. One who paid an amount to a servant claiming to have an action for injury and procured his release was not required to notify the servant to employ an attorney or someone able to give him business advice.

Release—Circumstances—Pleading.

7. The duty of giving such notice to the servant, if any, should have been averred with facts showing that plaintiff came within their scope.

Release—Invalidity—Returning Consideration.

8. In a servant's action for injury, the consideration paid for the release set up by defendant is to be deducted from any greater amount recovered against the defendant.

From Yamhill: WEBSTER HOLMES, Judge.

This is an action by Harry Ingram against the Carlton Lumber Company and others, to recover for personal injuries. From a judgment in favor of plaintiff, defendants appeal. The facts in the case are set forth in the opinion of the court.

REVERSED. NEW TRIAL ORDERED.

For appellants there was a brief over the names of *Mr. F. C. Howell, Messrs. Wilbur, Spencer & Beckett, Mr. A. L. Clark* and *Messrs. McCain, Vinton & Burdett*, with an oral argument by *Mr. Howell*.

For respondent there was a brief over the names of *Mr. Isham N. Smith, Mr. Lon L. Parker* and *Mr. Richard Talboy*, with an oral argument by *Mr. Smith*.

Department 1. MR. JUSTICE BURNETT delivered the opinion of the court.

This is an action instituted against three defendant corporations, charging them jointly under the Employers' Liability Act for injuries received by plain-

tiff while working for them upon their lumber-yard. The employment was admitted by the answer, but all the allegations of the complaint imputing negligence or any act of commission or omission operating to the hurt of the plaintiff were traversed. In the affirmative the answer set forth the following:

“That on the twenty-fourth day of March, 1914, the said plaintiff made a claim against these defendants on account of said accident, and that on said day the said Carlton Fir Lumber Company paid to the said plaintiff the sum of \$150 in full and agreed satisfaction of the disputed claim growing out of the accident that happened to said Ingram mentioned in the said complaint on the tenth day of March, 1914, which is the accident referred to herein, satisfying in full all the claims of this plaintiff for bodily injuries on account of said accident on account of which these defendants might be legally liable, or on account of which either one of them might be liable, and in consideration of the said sum of \$150 said plaintiff did release and forever discharge said Carlton Fir Lumber Company, its successors and assigns, from any and all actions or causes of action, claims or demands of the said plaintiff on account of any damage, loss or injury that was suffered or sustained on account of said accident and injury, which is the same injury referred to in said complaint, and that the said claim of the said plaintiff has been settled, satisfied, compromised and discharged, and the said plaintiff has executed to these defendants and each of them a full and complete satisfaction and release, and that said claim of plaintiff alleged herein has been fully paid, satisfied and discharged.”

In respect to this defense the reply admits the payment of \$150, but otherwise denies the allegation of release, and then goes on to state as follows:

“Affirmatively this plaintiff avers that about the twenty-fourth day of March, 1914, the defendants

represented to plaintiff and told him that they would pay and did pay him for his loss of time caused by the injuries complained of herein, and that plaintiff accepted whatever sums were paid him as payment for his said lost time, and not in satisfaction for his injuries; that the plaintiff thereupon signed a document, which he was informed and believed was a receipt for payment for his lost time as herein alleged; that the contents of said instrument were never explained to plaintiff to be for a complete, or other satisfaction for his injuries, or at all; that if the said instrument purports to be a release of the matters and things involved in this cause, such instrument was procured from the plaintiff by the defendants through misrepresentation and deceit, as herein alleged, and the minds of the plaintiff and defendant never met upon the alleged and purported agreement set up in the second affirmative answer of the defendant.'

1. The reply is insufficient in the new matter for several reasons. It does not state that the document mentioned therein was the release relied upon by the defendant. Further, while he said "he was informed and believed that the paper was a receipt for payment for his lost time as herein alleged," he does not state by whom that information and belief was imparted, whether by the defendants or anyone acting for them, or not. Again, it is said "that the contents of said instrument were never explained to plaintiff to be a complete, or other satisfaction for his injuries, or at all." No fact is stated making it the duty of the defendants to explain the paper or its contents. No false representation is imputed to them, and no effort to hoodwink or deceive plaintiff is mentioned. This court has laid down the precept in *Leavengood v. McGee*, 50 Or. 233, 239 (91 Pac. 453, 456), in this language:

"The rule is that the facts upon which fraud is predicated must be specifically pleaded. A mere general averment of fraud is nothing but the averment of a conclusion, and will not suffice. It presents no issue for trial, and is bad on demurrer. Such an averment not only renders the bill or complaint demurrable, but it will not even sustain a decree": 20 Cyc. 734; *Leasure v. Forquer*, 27 Or. 334 (41 Pac. 665).

Construing a pleading in *Anderson v. Adams*, 43 Or. 621, 627 (74 Pac. 215, 217), Mr. Chief Justice MOORE enunciates the principle in these words:

"To constitute a fraud by false representations, so as to entitle the plaintiff to relief, three things must concur: (1) There must be a knowingly false representation; (2) the plaintiff must have believed it to be true, relied thereon, and have been deceived thereby; and (3) that such representation was of matter relating to the contract about which the representation was made which if true, would have been to the plaintiff's advantage, but, being false, caused him damage and injury."

The principle is reiterated and the cases reviewed by Mr. Justice RAMSEY in *McFarland v. Carlsbad Sanatorium Co.*, 68 Or. 530 (137 Pac. 209, Ann. Cas. 1915C, 555). Thus tested, the reply fails to assign a reason sufficient to release the plaintiff from the writing he executed.

Finally, the new matter of the reply is an effort to plead a rescission of the contract, but does not show that as a part thereof the plaintiff has even offered to return the money he received. The views of the writer on that subject, with the authorities, are set forth in the dissenting opinion in *Foster v. University Library Co.*, 65 Or. 46, 67 (131 Pac. 736). The plaintiff himself testified that he signed the following writing:

“Carlton, Ore., March 24—14.

“I, Harry Ingram, a bachelor, twenty-two years of age, and of sound mind, do hereby release and forever discharge the Carlton Fir Lumber Company, for and in consideration of \$150, from any and all claims arising or to arise from or on account of the injury sustained by me on or about March 10, 1914, at the plant of the Carlton Fir Lumber Company at Carlton, Ore.

“[Signed] HARRY INGRAM.”

The plaintiff had a common school education and could read and write. The instrument fixed the rights of the contracting parties unless the same is set aside on account of fraud or some like reason properly pleaded. Without averring some mental defect disqualifying him to make a contract, or some fraud or deceit practiced upon him by the defendants, it will not avail him to allege merely that he did not understand the document in question. Above all, having profited by the transaction, common honesty, which lays its injunction alike upon the learned and unlearned, the rich and the poor, requires that accompanying the rescission he should return the benefit derived from the contract before trying to get more out of the defendants. What is here stated about the plaintiff's duty to return the money paid to him on the alleged release is the opinion of the writer in which some other members of the court participating in the hearing of this case do not concur.

2. The loss of time resulting from the injury, together with the attendant deprivation of wages, constitutes an element of damage recoverable in an action of this sort. The plaintiff says he understood the paper in question to be a receipt for such prospective wages. Adopting his own construction of it, and still

allowing him to prosecute this cause, notwithstanding the release, is nothing less than permitting him to split his cause of action.

3. It is hornbook law that this is not allowed, and that all the elements of damage relied upon must be included in one complaint, to the end that there shall be but one recovery for the one tort. It would be quite as logical, after final judgment in this action shall have been paid, to sustain him in another to recover for the value of medical attendance, then in a different one for hospital fees, and afterward to let him sue for nurse hire. To overturn the release on the showing made in this case is, in effect, making it virtually impossible for an employer to settle claims for injuries incurred in his service. He will perforce be compelled to litigate them. Any amount he may pay in adjustment of a demand will be used in promoting an action against him upon the same demand. Fair play, if nothing else, requires that, if a plaintiff would rescind the release, he should restore the other party to his former situation, so that each may start even in any subsequent contest. In practice this would work no injustice, for those who profit most in promoting such litigation are generally able to advance the money for all attendant purposes.

Upon the subject of the release the court gave and the defendants excepted to the following instruction:

"It is contended here by these defendants that the plaintiff, for a consideration of \$150, released and settled all claims he might have against the Carlton Fir Lumber Company and its successors. Only the one defendant, and in support of that contention they have introduced in evidence a release here, what purports to be a release—it is for you to determine whether or not it has that effect, under the instruction which I will give you, and which has been read to you. This docu-

ment only purports to release one defendant. It is entirely silent as to the other defendant in this action. So, if it were valid at all, it would only release the one; and I will instruct you, as a matter of law, if this release were obtained fairly and executed understandingly by this plaintiff, and this attorney, Thompson, who has testified here, performed his duty as an attorney and lawyer, it would be binding upon this plaintiff, and release them so far as the defendant mentioned in the release was concerned, and if it has not been so procured and executed, it is absolutely void; so the question for you to determine is whether or not that has been done or not.

“Now, in approaching that situation, you should first take into consideration, consider carefully, the age and experience of this plaintiff as disclosed by the evidence, his education, the circumstances under which he labored at the time he signed this. You have heard the testimony upon that as to his condition of body and mind, and all of the surrounding circumstances attendant upon this man Thompson’s visiting him and going out of his room with this document which is in evidence. And, on the other hand, you will take into consideration, which is undisputed here, the education of the man Thompson, and his claim of sufficient knowledge to enter into the practice of law, which is of itself a statement, as you might call it, to the public that he has passed the required qualifications to follow that profession, and it imputes to the public and every person that has occasion to come in contact with him that he is honest, will deal with all persons fairly, and will take no undue advantage. I am speaking now of the genuine lawyer. I make no reference to shysters, or any of that class of men, who are a disgrace to the profession, not intimating that Thompson is one of that class. That is for you to determine.

“Now the laws of this state with reference to attorneys, as to their general duties, amongst others, is to maintain such an action, suit, proceeding, or defense only as may appear to them a legal and just defense

of the person charged with an offense, and to employ for the purpose such means as would be honorable, and never seek to mislead the court or jury by any artifice or false statement of law or fact, and, aside from what comes within the general duties which prescribe the attitude of an attorney at law, or lawyer before the public, the law requires that before an individual can be admitted to practice law he furnish sufficient proof to the Supreme Court of good character, and that he will not enter into the practice of deceiving people, and if an attorney in the transaction of business with any individual does not disclose every element and fact in connection with the controversy and explain carefully and truthfully their rights, he is not discharging his duty, and the courts will scrutinize his conduct, and the action of every attorney is bound to be based on the utmost good faith before it will stand. If not, the courts will set it aside in the proper proceedings against him; and it was the duty of this man Thompson, who, the evidence shows, went down—he claims he went down voluntarily, although he represented this indemnity company—to visit this plaintiff. If he wanted to effect any settlement with this young man, the law required of him that he disclose and state accurately and truthfully to the young man all his rights, legal rights, in this matter, and he could not act for this plaintiff and this other company as attorney at the same time. He either had to represent one or the other, and if you should find he was there at the instance of some other client, this indemnity company or either of the defendants, it was his duty to notify this young man, if he wanted to enter into any settlement, not being on an equality in education and experience, if you should so find, to employ an attorney of his own or someone who was able and competent to give him business advice. And if he did not do that, this settlement is void from every standpoint. And you have heard the evidence of the two of them with reference to that.”

4. The instruction is wrong in more respects than one. In saying that “this document only purports to

release one defendant, it is entirely silent as to the other defendant in this action, so that, if it were valid at all, it would only release the one," the court ignored the rule laid down in *Stires v. Sherwood*, 75 Or. 108 (145 Pac. 645), which holds that a release of one joint tort-feasor releases all of them.

5. Moreover, the instruction proceeds upon the theory that the relation of attorney and client existed or was pretended by the defendants to exist between the plaintiff and the individual effecting the settlement whereby the plaintiff was deceived. This, however, is not pleaded on behalf of the plaintiff. Hence an instruction on that ground is purely academic and abstract and was on that account erroneous. It is elementary that the instructions should correspond with the pleadings.

6, 7. Again, without any pleading on the subject, the court cast upon the man who procured the release the duty of notifying the plaintiff "to employ an attorney of his own or someone who was able and competent to give him business advice," and drew the conclusion that, unless such notice was given, the "settlement is void from every standpoint." There is no rule of law that if one party to a transaction is represented by an attorney the other must be. If such a duty were enjoined by law under any circumstances, they should be averred, and facts stated showing that the plaintiff came within their scope. In any event, the release would not be void, but only voidable, for lawful reasons properly averred.

8. In speaking of the amount of damages the court said to the jury:

"Should you find for the plaintiff, you are not to take into consideration this \$150 that has been paid to him; that has not anything to do with this case."

The most ultra of the authorities which lean toward allowing a plaintiff to retain the consideration paid for the alleged release, and yet sue for damages in a greater amount, do not hold that no account must be taken of the money thus paid, but rather that it should be deducted from any greater amount in which the plaintiff is found to be injured.

The judgment should be reversed and a new trial ordered.

REVERSED. NEW TRIAL ORDERED.

MR. JUSTICE BENSON concurs.

MR. JUSTICE McBRIDE concurs in the result.

MR. CHIEF JUSTICE MOORE dissents.

Submitted on brief October 13, affirmed October 22, 1915.

SINGLETON v. RHODES.

(152 Pac. 266.)

Appeal and Error—Review—Findings.

1. A finding of the trial court supported by a preponderance of evidence must be upheld on appeal.

From Linn: **WILLIAM GALLOWAY, Judge.**

In Banc. Statement by **MR. JUSTICE EAKIN.**

This is a suit by S. H. Singleton against E. H. Rhodes to foreclose a mechanic's lien.

The answer says the contract was for \$30, and that the work was not performed in accordance therewith, but he tendered \$30, and brought that sum into court as full payment. The court below heard the testimony, and entered a decree for the amount claimed and for \$20 as attorney's fee.

AFFIRMED.

For appellant there was a brief by *Mr. William S. Risley*.

For respondent there was a brief over the name of *Mr. Dan Johnston*.

MR. JUSTICE EAKIN delivered the opinion of the court.

Only a question of fact is involved. The court below saw the witnesses and heard their testimony. This we have read, and find that the preponderance is with the plaintiff.

The decree is therefore affirmed. **AFFIRMED.**

Motion to dismiss argued September 22, allowed October 22, 1915.

EAST SIDE MILL CO. v. FELDMAN.

(152 Pac. 266.)

Appeal and Error—Decisions Appealable—Consent Decree.

1. A defendant whose attorney stipulated that another defendant might have a decree in its favor, and who approved the decree prepared and presented to him, could not appeal from such decree.

From Multnomah: **HENRY E. MCGINN**, Judge.

This is a suit by the East Side Mill & Lumber Company and the Portland Hardwood Floor Company, a corporation, against Ernest Feldman and Poldi Feldman, his wife, Frank Holten, W. B. Starr, J. H. Fonner, the Laurelhurst Company, a corporation, to foreclose a lien. Respondent moves to dismiss the appeal. The facts are stated in the opinion of the court.

APPEAL DISMISSED.

Messrs. Lewis & Lewis, for the motion.

Mr. Robert C. Wright, contra.

IN BANC. MR. JUSTICE EAKIN delivered the opinion of the court.

1. This is a suit to foreclose a lien. The Portland Hardwood Floor Company answered, setting up its lien. The Laurelhurst Company filed a demurrer, which being overruled, the company answered. The case came on for trial, when the following occurred, according to the recitation in the decree:

“At said time it was stipulated and agreed in open court by and between said Lewis & Lewis, attorneys for said defendant and cross-complainant, Portland Hardwood Floor Company, and Hayes & Wangerien, attorneys for defendant Laurelhurst Company, that the defendant and cross-complainant, Portland Hardwood Floor Company, might have a decree foreclosing its certain mechanic's lien filed against lot 4, block 115, Laurelhurst, for the sum of \$93.25, with interest thereon at the rate of 6 per cent per annum from the 3d day of July, 1913, until paid, and for the further sum of 90 cents for filing and recording said lien and for its costs and disbursements incurred in the prosecution of this suit, and for \$20 attorney's fees.”

After said stipulation counsel prepared a decree and presented the same to attorneys for defendant Laurelhurst Company, who approved the same, which was then taken to the judge, signed and regularly entered on the journal. The Laurelhurst Company now appeals from the decree, and the Portland Hardwood Floor Company moves to dismiss the appeal for the reason that the decree was consented to by the Laurelhurst Company. The appellant denies this is a consent decree, and further alleges that the objection that

the complaint does not state facts sufficient to constitute a cause of suit is never waived. In *Rader v. Barr*, 22 Or. 495 (29 Pac. 889), this court held:

“By consenting to the rendition of a judgment in favor of the plaintiff * * for the amount claimed, the defendant, in effect, waived his answer and left no issue in the case to be tried, and from such a judgment no appeal lies.”

This case has been affirmed in this court many times. In *Schmidt v. Oregon Mining Co.*, 28 Or. 9 (40 Pac. 406, 1014, 52 Am. St. Rep. 759), this whole question was very thoroughly considered by Mr. Justice WOLVERTON, who says:

“The conditions, simply stated, are: The court is requested by one party to make certain findings, and to enter a decree thereon with certain definite conditions. To all this the other party consents, and the decree is entered. Now, the party making the request appeals to this court, and demands that the decree be reversed in part, without even so much as moving the lower court to modify its findings, or the decree entered thereon, or calling its attention to errors and irregularities, so that the court could, upon its own motion, purge the record of its infirmities. To say the least, this is not fair treatment of the court below, and in support of its decree this court will presume the consent of plaintiff to the entry thereof in its present form: *Hayne's New Trial and Appeal*, § 285, p. 846; *Parker v. Altschul*, 60 Cal. 380; *Lesse v. Clark*, 28 Cal. 36; *Wilson v. Dougherty*, 45 Cal. 35; *Reynolds v. Hosmer*, 45 Cal. 637. Consent excuses error, and ends all contention between the parties. It leaves nothing for the court to do but to enter what the parties have agreed upon, and, when so entered, the parties themselves are concluded. From such a decree there is no appeal.”

This opinion disposes of the case, and the appeal must be dismissed.

APPEAL DISMISSED.

Motion to dismiss appeal argued September 22, allowed October 22, 1915.

LENGELE v. MOORE.

(152 Pac. 267.)

Appeal and Error—Judgment Entry—Consent Decree.

1. Where a decree in the trial court is entered by consent of the parties, no appeal can be taken.

From Polk: HARRY H. BELT, Judge.

In Banc. Statement by MR. JUSTICE EAKIN.

This is a suit by Theodore Lengele against Mrs. B. McN. Moore, J. M. Hanslimair, Geo. O. Sloan and Daisy A. Sloan, in which the respondent files motion to dismiss the appeal. In this case the court finds that by stipulation the appellants and respondent consented to the decree as entered. The notice of appeal was served the first day of July, 1915. The undertaking was served on the twelfth day of July, and filed the same day. No further time was granted to file the transcript, but it was filed in this court on the thirty-first day of August, 1915. Respondent moves to dismiss the appeal upon two grounds: (1) That the transcript was not filed within the time required by law; and (2) that it is a consent decree. **APPEAL DISMISSED.**

Mr. Samuel M. Endicott, for the motion.

Messrs. Unruh & Macy, contra.

MR. JUSTICE EAKIN delivered the opinion of the court.

1. The motion must be sustained upon both grounds. Appellant's time to file his transcript in this court expired on the sixteenth day of August, and it was not

filed until the 31st. The law requires that it shall be filed within 30 days from the time the appeal is perfected, which time was the seventeenth day of July. The case of the *East Side Lumber Co. v. Feldman et al.*, ante, p. 644 (152 Pac. 266), holds that a consent decree cannot be appealed from, citing numerous authorities which it is not necessary to repeat here.

APPEAL DISMISSED.

Argued October 8, affirmed October 22, 1915.

DAVIES v. REA.*

(152 Pac. 267.)

Frauds, Statute of—Default of Another—Consideration—Sufficiency.

1. Where defendants, the principal stockholders of a hotel company, signed a writing whereby, in consideration of the forbearance of plaintiff to foreclose a mortgage thereon, defendants agreed to pay the sum secured at a later date, together with interest, attorneys' fees, and costs, the undertaking is enforceable; there being a sufficient memorandum under Section 808, L. O. L., providing that an agreement to answer for the default of another must be in writing embracing the consideration, and subscribed by the party to be charged.

[As to promise to pay for debt of another, see notes in 5 Am. Dec. 321; 95 Am. Dec. 251; 46 Am. Rep. 296; 126 Am. St. Rep. 487.]

From Multnomah: GEORGE N. DAVIS, Judge.

Department 1. Statement by MR. JUSTICE BURNETT.

This is an action by H. H. Davies and George A. Kelly against Don P. Rea and L. Y. Keady. The substance of the complaint, which was filed June 13, 1913, is that the Gateway Hotel Company had given its note and mortgage to the plaintiffs and had failed to pay

*On agreement of shareholder to become responsible for amount of company's debt as "a promise to answer for debt of another," see note in 3 B. B. C. 611.

the same at maturity, whereupon the defendants signed a writing which, after reciting the indebtedness and that the plaintiffs here were about to foreclose the mortgage, contained the following stipulation:

"Now, therefore, as holders of and owners of the majority of the stock of the Madras Hotel Company, and realizing that, if said property was sold under foreclosure, it will be at a sacrifice, now, in consideration of the extension of the time for the collection of said sum until May 22, 1913, we, the undersigned, L. Y. Keady and Don P. Rea do bind ourselves individually and personally, each for himself, and not one for the other, to pay said Davies and Kelly said full sum of money, together with interest, at the expiration of said period, May 22, 1913.

"We further agree and bind ourselves that in the event of a suit for the collection of said indebtedness, or any part of it, we will pay the said Davies and Kelly the sum of two hundred (\$200) dollars as attorneys' fees and such other costs as they may have expended in said action."

It is also alleged that the note and mortgage are long past due and unpaid, and that the obligation of the defendants has not been paid and is past due. A general demurrer to the complaint was overruled.

The answer admits the execution of the writing and that the hotel company had failed to pay the note and mortgage. It affirmatively states:

"That the promise or agreement set forth in the complaint was a special promise to answer for the debt or default of the Madras Hotel Company, named in the complaint; that no note or memorandum of said promise or agreement expressing a consideration was made or signed by the defendants or either of them, or by any person by their authority, or at all, and the instrument named in the complaint and marked Exhibit 'A' was made and signed by the defendants without any consideration."

The reply traverses the allegations of the answer. The court made findings of fact and conclusions of law upon which it rendered judgment for the plaintiffs for \$175, attorney's fees, and otherwise according to the prayer of the complaint. Defendants appeal. The only assignments of error are these:

“(1) The court erred in overruling defendants' demurrer to the complaint; (2) the court erred in giving judgment for plaintiffs, for that the findings are not sufficient to support said judgment.” AFFIRMED.

For appellants there was a brief over the names of *Mr. H. K. Sargent* and *Mr. Harrison Allen*, with an oral argument by *Mr. Sargent*.

For respondents there was a brief over the names of *Mr. Frank Schlegel* and *Mr. E. E. Miller*, with an oral argument by *Mr. Schlegel*.

MR. JUSTICE BURNETT delivered the opinion of the court.

The defendants contend that the writing which they signed is not sufficient to charge them under the statute of frauds embodied in Section 808, L. O. L. As applicable to this case the statute reads thus:

“In the following cases the agreement is void unless the same or some note or memorandum thereof, expressing the consideration, be in writing and subscribed by the party to be charged, or by his lawfully authorized agent; evidence, therefore, of the agreement shall not be received other than the writing, or secondary evidence of its contents, in the cases prescribed by law: * * 2. An agreement to answer for the debt, default, or miscarriage of another. * * ”

The paper recited that it was executed “in consideration of the extension of the time for the collection

of said sum until May 22, 1913." The defendants rely upon *First Nat. Bank v. Cecil*, 23 Or. 62 (31 Pac. 61, 32 Pac. 393), holding that:

"An agreement by a creditor to forbear prosecuting his claim, and an actual forbearance by him, is a good consideration to sustain a promise of a third person to pay the claim; * * but a mere forbearance without such promise is not. * * And this is so although the act of forbearance was induced by the defendant's promise."

The teaching of that case is, in effect, that without a supporting contract to characterize it, pure forbearance could not be distinguished from neglect of the promisee to compel payment. Delay only, if nothing else is shown, does not alter the situation or the rights or obligations of the parties. But in this juncture that is not by the mark. The consideration was the extension of time. This implies an affirmative act on the part of the holder of the note, and is not the bare negative of forbearance or procrastination. This positive act of the plaintiffs is expressed in the agreement which the defendants made. Their argument would be *apropos* if, in fact, the plaintiffs had violated the stipulation and had sued on the principal obligation before the extension had expired for then the stated consideration would have failed. Expressing, as it does, the consideration, the writing subscribed by the parties sought to be charged is sufficient within the statute of frauds.

The judgment is affirmed.

AFFIRMED.

MR. CHIEF JUSTICE MOORE, MR. JUSTICE MCBRIDE and
MR. JUSTICE BENSON concur.



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ABATEMENT AND REVIVAL

Abatement and Revival—Enjoining Action at Law—Grounds of Demurrer—Action Pending.

1. Demurrer, in an equity bill to stay proceedings at law, on the ground that there is another action on the same subject matter between the same parties pending, should be overruled; the pendency of the law action being a prerequisite in such case to the filing of the bill. (*Miller v. Fisher*, 532.)

ABSTRACT.

Remedy of Respondent for Insufficient Abstract.

See Appeal and Error, 10, 11.

ACCOUNT.

Account—Evidence—Sufficiency.

1. In a suit for an accounting between plaintiff and defendant for commissions received from the sale of real estate, evidence *held* to show that the transaction between the parties was ended and that defendant had accounted. (*Bolin v. Walters*, 501.)

ACTION.

Action—Moot Cases.

1. A suit by a taxpayer to enjoin a city from contracting for the construction and operation of a railroad, as authorized by the charter, and from issuing bonds for the construction thereof, will not be dismissed as fictitious merely because the suit is a friendly one, pursued without rancor, and with the understanding that unnecessary delays will not be permitted. (*Pearce v. Roseburg*, 195.)

Action—Splitting Cause of Action.

2. A party is not allowed to split his cause of action, but all the elements of damages relied upon must be included in one complaint. (*Ingram v. Carlton Lumber Co.*, 633.)

See Attorney and Client, 3.

See Counties, 2.

See Death, 1-3.

See Dower, 1.

See Insurance, 2, 4.

See Joint Adventures, 1.

See Landlord and Tenant, 4-6.

See Master and Servant, 20.

See Mechanics' Liens, 5.

See Municipal Corporations, 24.

See Pleading, 4.

See Principal and Surety, 1-3.

Action to Recover Deposit to Secure Rent.

See Evidence, 7.

See Landlord and Tenant, 1, 2.

ADEQUATE REMEDY AT LAW.

See Injunction, 2.

ADMISSIONS.

See Criminal Law, 5, 17.

See Evidence, 7.

See Mandamus, 3.

See Pleading, 2, 5.

ADVERSE POSSESSION.**Adverse Possession—Continuity.**

1. Where title to plaintiff's and defendant's lot had united in one owner within 10 years from the construction of a walk alleged by plaintiff to be a foot or so on defendant's lot, there was a break in the continuity of the adverse possession, and plaintiff's adverse possession dated only from the time of his purchase from such owner. (Joy v. Palethorpe, 552.)

ADVERTISING.

See Constitutional Law, 8, 9.

See Obscenity, 1, 2.

AMENDMENT.

See Highways, 1.

See Statutes, 4.

ANIMALS.**Animals—Injury by Vicious Horse—Evidence—Subsequent Acts Showing Disposition.**

1. In an action by a servant for injuries alleged to result from the viciousness of a horse given him to drive, evidence of conduct of the horse subsequent to the accident was admissible to show its disposition. (Marks v. Columbia County Lumber Co., 22.)

See Evidence, 4.

APPEAL AND ERROR.**Appeal and Error—Harmless Error—Evidence—Necessary Methods of Work.**

1. In an action against a logging company, which operated a logging railroad, for the death of its servant on a train, where defendant's superintendent was allowed to testify that it was not necessary for any of the train crew to travel over the cars while in motion, the admission of such opinion evidence was not prejudicial to plaintiff, since the fact that the service, being rendered by the servant in traveling over the train while in motion, could have been performed in a different manner when the train was at a standstill, did not disprove that such servant followed the usual and ordinary course of his employment in so doing. (Evansen v. Grande Ronde Lumber Co., 1.)

Appeal and Error—Presumptions—Qualification of Expert.

2. In an action against an employer for death of a servant by the breaking of a chain securing logs on a train, where the defendant logging company's superintendent was allowed to give his opinion in evidence as to the strength of wire with which broken chains were repaired, as compared with the strength of a link, and where, on appeal, the bill of exceptions set out no testimony as to the witness' qualifications as an expert on the point, except that he had had many years' experience as defendant's superintendent, the court would assume that he was qualified, and that the jurors had no general knowledge of the subject testified to. (*Evansen v. Grande Ronde Lumber Co.*, 1.)

Appeal and Error—Review—Harmless Error.

3. The admission of corroborative evidence which had no substantial influence on the determination was harmless. (*Smith v. National Surety Co.*, 17.)

Appeal and Error—Review—Objections to Cost Bill.

4. Objections to the cost bill, which had not been decided by the trial court, could not be considered on appeal, though discussed in the briefs. (*Meagher v. Eilers Music House*, 70.)

Appeal and Error—Review—Harmless Error.

5. Under Article VII, Section 3, of the Constitution, it is the duty of the Supreme Court, when the transcript on appeal contains all the proceedings below, to examine the record and determine whether an error was so harmful as to require reversal. (*Kveset v. Grace & Co.*, 83.)

Appeal and Error—Damages—Personal Injuries—Measure.

6. Where plaintiff suffered a Pott's fracture of the ankle, which in the consensus of medical opinion would be permanent, and it appeared that plaintiff could do very little walking on the injured leg nearly a year after the accident, and that before he had been earning at least \$4.50 a day as a stevedore, an award of \$3,100 cannot be held excessive; hence an instruction that the jury should use their hearts as well as their minds in assessing damages was not prejudicial. (*Kveset v. Grace & Co.*, 83.)

Appeal and Error—Harmless Error—Erroneous Admission of Evidence.

7. Where a physician testified on direct examination that plaintiff suing for personal injuries would probably have as good an arm as ever, and that the injuries were not permanent, error in allowing on cross-examination a question answered in the negative as to whether he would, aside from the pain and inconvenience, just as soon have his arm in the condition in which plaintiff's arm then was, was not prejudicial. (*Lang v. Camden Iron Works*, 137.)

Appeal and Error—Objections to Decree—Cross-appeal.

8. An appellee, not taking a cross-appeal, is presumably satisfied with the decree as rendered by the trial court. (*McNiell v. Holmes*, 165.)

Appeal and Error—Moot Cases.

9. The power of the court on appeal to dismiss a case as fictitious should not be exercised except where the fictitious character appears either from the pleadings or from satisfactory evidence, especially where persons, claiming that the suit is fictitious, fail to appear and make the objection and avail themselves of the point in the trial court. (*Pearce v. Roseburg*, 195.)

Appeal and Error—Improper Argument of Counsel—Effect.

10. Where the main issue in the case involved the right of plaintiff to recover for a personal injury, and that issue was fairly submitted to the jury, and the manner of conducting the trial and the amount of the verdict did not indicate that the amount was increased by any improper remarks of plaintiff's counsel, the improper remarks were not reversible error. (*Tompkins v. Portland Ry., L. & P. Co.*, 174.)

Appeal and Error—Abstract—Insufficiency—Remedy.

11. Jurisdiction of an appeal having been obtained by the filing of a transcript, if respondent considers the abstract filed by appellant improper or unfair, his remedy is to file such an additional abstract as he deems necessary to a full understanding of the questions involved, as provided by Supreme Court Rule 7 (56 Or. 616, 117 Pac. x). (*Williams v. Pacific Surety Co.*, 210.)

Appeal and Error—Bill of Exceptions—Abstract—Diminution of Record.

12. Where an abstract of the record on appeal refers to a bill of exceptions and states that a transcript of the testimony is made a part thereof, but neither has been filed in the Supreme Court, a diminution of the record may be suggested and proper correction made on application if counsel cannot stipulate the facts desired as authorized by Supreme Court Rule 40 (56 Or. 629, 117 Pac. xiv). (*Williams v. Pacific Surety Co.*, 210.)

Appeal and Error—Proceedings to Transfer Cause—Notice of Appeal.

13. Under Section 550, L. O. L., making a notice of appeal sufficient if it contains the title of the case, the names of the parties, and notifies the adverse party or his attorney that an appeal is taken from the judgment, a notice "that the above-named plaintiff appeals to the Supreme Court of this state from the judgment entered May 23d, in favor of the defendant, and appeals from whole of such judgment," is sufficient, where the transcript shows that, at a regular term of court in the county from which the appeal is taken, a judgment was rendered on May 23, 1914, between the parties named in the title of the case in favor of defendant. (*Raiha v. Coos Bay Coal & Fuel Co.*, 275.)

Appeal and Error—Rulings on Evidence—Bill of Exceptions.

14. Under Section 171, L. O. L., providing that an objection shall be stated with so much of the evidence as is necessary to explain it, an exception to a ruling on evidence is not reviewable unless there is copied in the bill of exceptions so much of the testimony as will enable the court on appeal to understand the question involved. (*Raiha v. Coos Bay Coal & Fuel Co.*, 275.)

Appeal and Error—Questions Reviewable—Rulings on Instructions—Bill of Exceptions.

15. Where an exception is taken to an instruction, which under the pleadings is improper under any view of the law, the error is reviewable, though no testimony is incorporated in the bill of exceptions. (*Raiha v. Coos Bay Coal & Fuel Co.*, 275.)

Appeal and Error—Review—Presumption.

16. Where the bill of exceptions does not purport to contain all the evidence, and fails to state that none was offered on a particular issue, it will be presumed, from instructions given thereon, that they were predicated on evidence received thereon. (*Raiha v. Coos Bay Coal & Fuel Co.*, 275.)

Appeal and Error—Exceptions—Necessity.

17. An order sustaining a demurrer to the answer being made upon the matter in writing and on file in the court, no exception is necessary under Section 172, L. O. L., to obtain review on appeal. (*Pullen v. Eugene*, 320.)

Appeal and Error—Transfer of Cause—Notice of Appeal—"Signed by Himself or Attorney."

18. Under Section 550, L. O. L., providing that where notice of appeal is not given in open court, it must be in writing, "signed by himself or attorney," the appellant, with the approval of his attorney, or the attorney himself, may authorize another person to sign the attorney's name to a notice of appeal. (*Howard v. Hartford Ins. Co.*, 341.)

Appeal and Error—Notice of Appeal—Sufficiency of Service.

19. In view of Section 539, L. O. L., providing that notices may be personally served upon an attorney, or may be served during his absence by leaving notice at his office between 6 A. M. and 9 P. M. in a conspicuous place, returns of personal service of a notice of appeal on respondent's attorney, and of a service by leaving a copy thereof in a conspicuous place in his office between 6 and 9, when there was no person in the office, showed proper service. (*Howard v. Hartford Ins. Co.*, 341.)

Appeal and Error—Notice of Appeal—Order of Court.

20. An order entered of record, purporting to state certain facts as to the signing of a notice of appeal and the service thereof, and directed to be attached to the return of service of such notice, of which the appellant was not notified, and as to which neither party appeared, was void for want of jurisdiction to make it, and could not be considered for any purpose in passing on motions to dismiss for want of proper notice of appeal. (*Howard v. Hartford Ins. Co.*, 341.)

Appeal and Error—Waiver of Objections to—Demurrer—Pleading Over.

21. While a demurrer to the form of the complaint may be waived by pleading over, if such demurrer attacks the sufficiency of a complaint to state a cause of action, and it is overruled, pleading over does not waive it for the purpose of an appeal, since the sufficiency of the complaint can be attacked in the Supreme Court for the first time. (*Howard v. Horticultural Fire Relief*, 349.)

Appeal and Error—Findings—Conclusiveness.

22. Findings are conclusive on appeal, unless the court finds that there is no evidence to support them. (*United States Fidelity Co. v. Martin*, 369.)

Appeal and Error—Questions Reviewable—Assignment of Error—Bill of Exceptions.

23. A complaint as to the measure of damages, in an action for fraud, cannot be reviewed on appeal, where it is not assigned as error or presented by the bill of exceptions. (*Aitken v. Bjerkvig*, 397.)

Appeal and Error—Questions Reviewable—Disposition of Case on Appeal—Constitutional Provisions.

24. The Supreme Court, on appeal from a judgment for defendant in an action for rent, must, under Article VII, Section 3, of the Constitution, as amended in 1910 (see Laws 1911, p. 7), find the reasonable rental value of the land from all the evidence in the record, where the complaint seeks a recovery for the reasonable rental value. (*Martin v. Fletcher*, 408.)

Appeal and Error—Perfecting of Appeal—Serving and Filing of Undertaking.

25. An appeal is perfected five days after the filing and serving of the undertaking on appeal, where appellant does not, as authorized by Section 550, L. O. L., as amended by Laws of 1913, page 617, except within five days to the sureties. (*Gross v. Gage*, 421.)

Appeal and Error—Filing of Transcript—Extension of Time.

26. Under Section 554, L. O. L., as amended by Laws of 1913, page 618, providing for the filing of the transcript within 30 days after perfecting the appeal unless time for the extension of the filing has been granted within the time allowed to file transcript, or the appeal shall be deemed abandoned, the filing of the transcript within the specified time is jurisdictional, and an extension of time is ineffectual when not made within the time allowed to file transcripts. (*Gross v. Gage*, 421.)

Appeal and Error—Verdict—Special Findings—Evidence.

27. A general verdict in harmony with special findings is conclusive on appeal, where there was some evidence in support of each finding. (*Hotel Marion Co. v. Waters*, 426.)

Appeal and Error—Harmless Error—Refusal of Instruction.

28. In an action for rent, the erroneous refusal of an instruction, that a notice given by defendant could not be construed as a notice to terminate the tenancy unless defendant was the tenant at the time it was given, was harmless, where it appeared that the question of such notice was immaterial and not considered by the jury, and that no material injury resulted. (*Hotel Marion Co. v. Waters*, 426.)

Appeal and Error—Injunction Pending Appeal.

29. On appeal from a decree dismissing a suit to enjoin a city from letting contracts and making assessments for street improvements, a temporary injunction will be granted by the Supreme Court, restraining the city from levying upon, attempting to sell, or selling any of

plaintiffs' property until the further order of the court. (*Lais v. Silvertown*, 434.)

Appeal and Error—Hearing—Evidence.

30. On appeal from a decree dismissing a suit to enjoin a city from letting contracts and making assessments for street improvements, the Supreme Court has no authority to make an order admitting in evidence upon the hearing a copy of an assessment ordinance enacted after the appeal was taken. (*Lais v. Silvertown*, 434.)

Appeal and Error—Findings in Equity—Harmless Error.

31. In an equity case, the failure of the trial court to file findings of fact and conclusions of law does not constitute reversible error. (*Beno v. Norris*, 506.)

Appeal and Error—Review—Harmless Error.

32. The erroneous refusal to give an instruction on the measure of damages is harmless, where the jury found that plaintiff was not entitled to recover anything. (*Fitzhugh v. Nirschl*, 514.)

Appeal and Error—Presumptions—Defect of Parties—Failure to Demur.

33. Where no demurrer is interposed alleging defect in parties, it will be assumed that there are no other parties in interest. (*Miller v. Fisher*, 532.)

Appeal and Error—Presentation of Ground of Review in Court Below—Necessity.

34. Where the case proceeded on the theory that defendant had denied plaintiffs' averments of fraud, and other paragraphs of the complaint containing similar averments were denied, the fact that two paragraphs were not specifically traversed cannot be taken advantage of on appeal; plaintiffs not having pointed out the defect. (*Howell v. Howell*, 539.)

Appeal and Error—Stay of Proceedings—Counter Undertaking—"Suit upon a Contract."

35. A suit to foreclose a mechanic's lien is not "a suit upon a contract," within Section 553, L. O. L., providing for the enforcement of a judgment or decree in such a suit, notwithstanding an appeal and undertaking for the stay of proceedings, upon the giving of a counter undertaking. (*Kollock & Co. v. Leyde*, 569.)

Appeal and Error—Stay of Proceedings—Temporary Injunction.

36. The Supreme Court has power to issue a temporary injunction to preserve the *status quo* of property pending an appeal. (*Kollock & Co. v. Leyde*, 569.)

Appeal and Error—Notice—Service—"Adverse Parties."

37. Parties who were debtors on a note and against whom a personal judgment was rendered for the amount thereof were not "adverse parties" upon whom a notice must be served of an appeal from such judgment. (*United States Nat. Bank v. Sheffer*, 579.)

Appeal and Error—Omissions from Record—Scope of Review.

38. Where the evidence received at the trial does not accompany the transcript, the only question to be considered is whether the

pleadings are sufficient to uphold the decree. (*United States Nat. Bank v. Shefler*, 579.)

Appeal and Error—Defect of Parties—Waiver.

39. In a suit to foreclose mortgages which had been assigned by the mortgagee, in which defendants pleaded a cancellation of the conveyance by the mortgagee constituting the consideration for one of the mortgages, it could not be objected that the mortgagee was not a party, where no litigant objected to the defect of parties by the filing of a demurrer, or affirmatively pleaded the necessity or propriety of making him a party; his presence not being indispensable. (*United States Nat. Bank v. Shefler*, 579.)

Appeal and Error—Harmless Error—Admission of Evidence.

40. In an action by an employee against a municipal corporation designated a port, to recover for personal injury from the breaking of a defective ladder, error, if any, in admitting evidence that after plaintiff went to work on the dredger one of the port commissioners told him that one R. was his boss and to do whatever he told him to do, was harmless, since the action fell within the scope of the Employers' Liability Act, and the port would be bound by the acts or directions of the foreman of the work. (*Mackay v. Commission of Port of Toledo*, 611.)

Appeal and Error—Evidence—Motions to Strike—Necessity.

41. Where an answer was not responsible to a question, the injured party must move to strike it, or the matter cannot be reviewed. (*Willis v. Horticultural Fire Relief*, 621.)

Appeal and Error—Review—Findings.

42. A finding of the trial court supported by a preponderance of evidence must be upheld on appeal. (*Singleton v. Rhodes*, 643.)

Appeal and Error—Decisions Appealable—Consent Decree.

43. A defendant whose attorney stipulated that another defendant might have a decree in its favor, and who approved the decree prepared and presented to him, could not appeal from such decree. (*East Side Mill Co. v. Feldman*, 644.)

See Costs, 1, 2.

See Criminal Law, 2, 4, 6, 11, 13.

Computation of Time for Filing Notice of Appeal.

See Time, 1.

APPLIANCES.

See Master and Servant, 3, 4, 8, 10, 11, 14, 21.

ASSESSMENT.

See Municipal Corporations, 1, 2, 6, 7, 23.

ASSIGNMENT OF ERROR.

See Appeal and Error, 22.

ASSIGNMENTS.

Assignments—Evidence—Sufficiency.

1. In an action against a surety on a logging contract, evidence held to support a finding that the contract, which had been assigned,

was reassigned to plaintiff before action was brought. (*Williams v. Pacific Surety Co.*, 210.)

ASSIGNMENTS FOR BENEFIT OF CREDITORS.

Assignments for Benefit of Creditors—Validity—Insolvency Act.

1. Where a debtor corporation assigned funds held by a trustee to one of its creditors, who was to prorate the payment with other creditors, and there was a partial payment *pro rata* of the debts, such payment not discharging the same, the assignment was not ineffective as a void attempt at a statutory assignment. (*Mann v. W. A. Gordon Co.*, 457.)

ASSUMPTION OF RISK.

See Master and Servant, 7, 15, 26.

ATTORNEY AND CLIENT.

Attorney and Client—Disbarment—Evidence.

1. Where the disbarment of an attorney is sought under Section 1092, L. O. L., as guilty of any willful deceit or misconduct in his profession, and such attorney has borne a good reputation in the community in which he lived, competent evidence against him should show that the accusation is true to justify disbarment. (*State ex rel. v. Garland*, 92.)

Attorney and Client—Disbarment—Conversion of State Funds—Statute.

2. Under Section 1092, L. O. L., providing that an attorney may be removed or suspended by the Supreme Court for being guilty of any willful deceit or misconduct in his profession, where an attorney was appointed special prosecutor for the state in proceedings to escheat certain property of a decedent, and, as such, received a check representing state funds due it in the proceedings, which he deposited to his individual bank account and converted wrongfully, withholding the amount from the state, and failing, refusing and neglecting to account therefor, he will be disbarred for the proper administration of justice, the protection of the public, of clients, of the courts, and the dignity of the legal profession. (*State ex rel. v. Garland*, 92.)

Attorney and Client—Action for Compensation—Employment—Sufficiency of Evidence.

3. In an attorney's action for a fee, evidence on the point of employment by the defendants held insufficient to make out a *prima facie* case. (*Loughran v. Barker*, 337.)

Effect of Improper Argument of Counsel.

See Appeal and Error, 8.

Conduct of Counsel in Reading Statutes to Jury.

See Trial, 1.

AUTHORITY.

See Corporations, 2-5.

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AUTOMOBILES.**Opinion of as to Speed of Car.**

See Evidence, 15, 16.

BIGAMY.**Bigamy—Lascivious Cohabitation—Statutes—"Polygamy."**

1. Section 2073, L. O. L., declaring guilty of "polygamy" a person who, having a former husband or wife living, shall marry another, or live and cohabit with another as husband or wife, and providing a punishment, which may be imprisonment in the penitentiary, is not repealed and supplanted by Section 2075, providing punishment, as a misdemeanor, if any man and woman, not being married to each other, shall lewdly or lasciviously cohabit or associate together; the second section not defining the same offense as the first, but proof being required under the first not required under the second. (*State v. Locke*, 492.)

Bigamy—Presumption—Validity of Former Marriage.

2. The presumption is generally in favor of the validity of a former marriage, absent evidence to the contrary. (*State v. Locke*, 492.)

Bigamy—Former Marriage—Evidence.

3. Evidence on a prosecution for polygamy *held* sufficient to prove a valid former marriage of defendant. (*State v. Locke*, 492.)

Bigamy—Cohabiting—Evidence.

4. Evidence on a prosecution for polygamy *held* sufficient to authorize a finding of defendant, having a wife, living and cohabiting with another as his wife. (*State v. Locke*, 492.)

BILL OF EXCEPTIONS.

See Exceptions, Bill of.

BILLS AND NOTES.**Bills and Notes—Presentment and Notice—Waiver.**

1. Section 5915, L. O. L., provides, relative to negotiable instruments, that presentment for payment is dispensed with by waiver of presentment express or implied. Section 5942 provides that notice of dishonor may be waived either before the time of giving notice has arrived or after the omission to give due notice, and the waiver may be express or implied. An indorser of a note agreed with the indorsee to look after the collection of the note, and subsequently prepared a notice to the maker to pay the note, which the indorsee signed and mailed to the maker. On the day the note became due the maker telephoned to the indorsee that he was not then able to pay it, and the indorsee called the indorser on the telephone, and the indorser consented that the maker should be given further time. *Held*, that it was the indorser's duty to carry out its undertaking, and, if anything was omitted, it had no cause to complain, and by its acts it waived presentment and notice of nonpayment. (*Moll v. Roth Co.*, 593.)

Bills and Notes—Presentment and Notice—Waiver.

2. An agreement at or before the maturity of a note that an extension of time shall be given is a sufficient circumstance or fact to authorize

an inference of waiver of presentment and notice of nonpayment. (Moll v. Roth Co., 593.)

Bills and Notes—Presentment and Notice—Waiver.

3. Any act, course of conduct, or language of an indorser calculated to induce the holder of a note not to make demand or protest or to give notice or to put him off his guard or any agreement to that effect will dispense with the necessity of taking such steps. (Moll v. Roth Co., 593.)

Bills and Notes—Presentment and Notice—Waiver.

4. The contingent liability of an indorser of a note is changed into a fixed liability by waiver of demand and notice. (Moll v. Roth Co., 593.)

Bills and Notes—Bona Fide Purchaser—Evidence.

5. Evidence in an action on a note *held* sufficient to go to the jury on the issue whether plaintiff was a holder in due course by transfer from the payee, who obtained it from defendant by fraud. (Farmers' State Bank v. West, 602.)

BONA FIDE PURCHASER.

See Bills and Notes, 5.

BOUNDARIES.

Boundaries—Boundary Agreement—Estoppel.

1. An agreement between adjoining owners as to a boundary line operated solely by way of estoppel. (Joy v. Palethorpe, 552.)

Boundaries—Estoppel—Pleading.

2. An estoppel by agreement of the parties respecting a boundary line must be pleaded. (Joy v. Palethorpe, 552.)

BRIEFS.

See Costs, 2.

BURDEN OF PROOF.

See Landlord and Tenant, 1.

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See Vendor and Purchaser, 3.

BYSTANDERS' BILL.

See Exceptions, Bill of, 1, 2.

CANCELLATION OF INSTRUMENTS.

Cancellation of Instruments—Relief—Recovery for Improvements.

1. A grantor, induced by fraud to execute a deed to a grantee for the benefit of a third person, promised the third person to compensate him for improvements made on the property, though such person was the principal in the fraud. *Held*, that the grantor, suing to set aside the deed for the fraud, must, on obtaining relief, compensate the third person for the improvements. (Jones v. Shefler, 284.)

Cancellation of Instruments—Suit to Set Aside Deed—Conditions.

2. A grantor, suing to set aside a deed for fraud, subsequent to the grantee therein executing a note and mortgage on the property to a third person, who in his complaint alleges that he brings in such note and mortgage subject to the order of the court, must, to obtain relief, procure the cancellation and surrender of the note, or satisfy any judgment procured thereon, as he is not entitled both to the property and the mortgage thereon. (*Jones v. Sheffer*, 284.)

See Injunction, 3.

See Municipal Corporations, 20.

CARRIERS.**Carriers—Injuries to Passengers—Negligence—Evidence—Instructions.**

1. Where, in an action for injuries to a street-car passenger, the evidence was conflicting on the issues whether the passenger attempted to board the car while standing and was thrown off by a sudden jerk of the car, or whether she attempted to board it while in motion, the court should charge that before the passenger could recover, she must show that she intended to board the car, gave notice thereof to the carmen, or that, in the exercise of reasonable care, they knew that she intended to board it, and if the carmen did not know that she intended to board it, there could be no recovery. (*Tompkins v. Portland Ry., L. & P. Co.*, 174.)

Carriers—Street Railroads—Carriage of Passengers—Care Required.

2. The stopping of a street-car at a place where passengers are usually received is an invitation to the public to board the car, and the invitation continues while the car remains standing, but the starting of the car is a withdrawal of the invitation, and during the time of the invitation the carmen must keep a look-out for persons seeking to take possession thereon. (*Tompkins v. Portland Ry., L. & P. Co.*, 174.)

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CONSIDERATION.

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CONSTITUTIONAL LAW.

Constitutional Law—Due Process of Law—What Constitutes.

1. An ordinance prohibiting the running of dogs at large provided that they should be impounded, and that, if known, notice should be given to the owners or custodians, who could redeem within three days, the dogs to be killed at the end of that time. *Held*, that Section 5731, L. O. L. making it larceny to steal a dog, recognizes it as property, and the ordinance was invalid, as working a deprivation of property without due process of law, not providing for notice, actual or constructive, to the owners or custodians of dogs seized. (*Rose v. Salem*, 77.)

Constitutional Law—Construction—Provisions Relating to Same Subject.

2. Those sections relating to the same subject matter, must be construed together. (*Robertson v. Portland*, 121.)

Constitutional Law—Privileges and Immunities.

3. Article I, Section 20, of the Constitution, forbidding laws granting to any citizen, or class, privileges or immunities which on the same terms shall not equally belong to all citizens, restricts the legislature, and is a limitation on the common council of a city, and prevents any discrimination against nonresidents of a city in occupation or license taxes. (*Ideal Tea Co. v. Salem*, 182.)

Constitutional Law—Licenses—Privileges and Immunities—"Peddler."

4. An ordinance of a city which imposes on peddlers a license, which defines a "peddler" as a person who, for himself or as the agent of another, goes from house to house selling or offering to sell for future delivery by sample, and which declares that the provisions shall not apply to any merchant or dealer having a regular place of business in the city in taking or soliciting orders for the sale and delivery of his merchandise, conflicts with Article I, Section 20, of the Constitution, prohibiting laws granting to any citizen or class of citizens privileges or immunities which on the same terms shall not equally belong to all citizens; for it imposes a license on nonresident solicitors, but permits merchants of the city to have their employees visit the houses of their customers and take orders for goods without a license. (*Ideal Tea Co. v. Salem*, 182.)

Constitutional Law—Remedy—Statute.

5. The charter provision that a city should not be liable to any person for injuries caused by defects in sidewalks or streets, unless the mayor, the chairman of street committee, or the street commission shall have had actual notice and reasonable opportunity to repair the defect, and that in no case shall more than \$100 be recovered as damages from the city, is not in violation of Article I, Section 10, of the Constitution, declaring that every person shall have remedy by due process of law for injuries done his person, property or reputation; for, as the city council is given power to repair the streets and sidewalks, one injured by reason of defects may maintain an action against the city officers for their breach of official duty. (*Pullen v. Eugene*, 320.)

Constitutional Law—Sunday—Due Process—Police Power.

6. Under the police power, whereby the state may provide for the public health, peace, welfare and safety, the legislature may prohibit the carrying on of particular occupations on Sunday, without violating Const. U. S. Amend. 14, prohibiting the deprivation of life, liberty or property without due process of law. (*State v. Nicholls*, 415.)

Constitutional Law—Equal Protection of Law—Class Legislation.

7. Section 2125, L. O. L., prohibiting any person from keeping open any store, shop, grocery, bowling alley, billiard-room or tipping-house for the purpose of labor or traffic, or any place of amusement on Sunday, but exempting theaters, drug-stores, doctor-shops, undertakers, butchers and livery-stable keepers is not void under Article I, Section 20, of the Constitution, declaring that no law shall be passed, granting any citizen privileges or immunities, which shall not equally belong to all citizens, and Const. U. S. Amend. 14, declaring that no state shall deny to any person equal protection of the law; the classification of occupations being a reasonable one. (*State v. Nicholls*, 415.)

Constitutional Law—Class Legislation—Prohibition of Advertising Venereal Cures.

8. Section 2095, L. O. L., denouncing the offense of publishing or advertising cures of venereal disease, was not unconstitutional as class legislation. (*State v. Hollinshead*, 473.)

Constitutional Law—Equal Protection of Laws—Prohibition of Advertising Venereal Cures.

9. Section 2095, L. O. L., denouncing the offense of advertising venereal cures, was not invalid as infringing the constitutional guaranty of equal protection of the laws. (*State v. Hollinshead*, 473.)

Constitutional Law—Judicial Functions—Matters of Policy.

10. Where the legislature failed to include counties in the operation of the Employers' Liability Act, the courts will not apply the act to actions against them, although as a matter of policy the law ought so to be applied. (*Rapp v. Multnomah County*, 607.)

See Appeal and Error, 23.

See Counties, 1.

See Criminal Law, 11.

See Intoxicating Liquors, 1.

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See Statutes, 1, 4.

CONSTITUTION OF OREGON.

Cited and Construed.

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CONSTRUCTION.

See Constitutional Law, 2.

See Death, 3.

See Evidence, 12.

See Master and Servant, 18, 19.

See Pleading, 2, 5.

See Statutes, 2, 3, 5.

CONTEMPT.

Contempt—Violation of Decree—Clerk's Affidavit in Third Person—Statute.

1. Under Section 829, L. O. L., providing that in all affidavits and depositions the witness must be made to speak in the first person, where a clerk of court deposed in the third person that defendant had failed to obey an order of the court respecting the payment of alimony, such affidavit was insufficient to confer jurisdiction on the court to make an order adjudging defendant in contempt, since the test of the sufficiency of an affidavit is whether a charge of perjury could be based on it, and it would be a good defense to such a prosecution to show that the paper was not, in contemplation of law, an affidavit. (*State ex rel. v. Eastman*, 522.)

CONTRACTS.

See Evidence, 17.

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CONTRIBUTORY NEGLIGENCE.

See Master and Servant, 25.
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CONVERSION.

See Attorney and Client, 2.

CORPORATIONS.

Corporations—Powers—Mode of Exercising.

1. Where power is given a corporation to do an act, and the particular method of its exercise pointed out, the mode is the measure of the power. (Barton v. School District No. 2, 30.)

Corporations—Corporate Officers—Powers of.

2. The payment of debts is part of the ordinary business of a corporation, and in the absence of proof to the contrary it will be presumed to be within the scope of the authority of a general manager, whether he be acting as an officer *de jure* or *de facto*. (Mann v. W. A. Gordon Co., 457.)

Corporations—Officers—Authority of General Manager.

3. An officer of a corporation may be authorized to act for it by parol, and proof of his authority may be shown in that manner; a special resolution of the board of directors being unnecessary. (Mann v. W. A. Gordon Co., 457.)

Corporations—Officers—Authority.

4. As a corporation can act only through its agents, the authority and power of the managing officers of the corporation in the aggregate are coextensive with those of the corporation itself. (Moll v. Roth Co., 593.)

Corporations—Officers—Authority.

5. An officer or agent may act for and bind a corporation within the scope of the authority conferred upon him, either expressly or impliedly. (Moll v. Roth Co., 593.)

COSTS.

Costs—Appeal—Plaintiff not Appealing.

1. Where a decree in favor of plaintiff awards to defendant an amount for taxes paid in excess of that due him, and plaintiff does not appeal, the judgment will be modified, but without costs of the appeal to either party. (McNiell v. Holmes, 165.)

Costs—Appeal and Error—Briefs.

2. Where the dismissal of an appeal was adhered to on hearing, where both the motion to reinstate the appeal and the merits were

presented, respondent is not entitled to costs for expense in printing a brief on the merits, for by contesting the motion to reinstate the appeal he precluded consideration of the matter on the merits. (*Gross v. Gage*, 421.)

Objections to Cost Bill.

See Appeal and Error, 4.

TENANCY.**Rights of.**

See Tenancy in Common, 1.

COUNTIES.**Counties—"Debt"—Warrants—Constitutional Limitation.**

1. Warrants issued by the proper county authorities for the amount of an overpayment of taxes do not represent "debts" or liabilities, within Article XI, Section 10, of the Constitution, declaring that no county shall create any debts or liabilities which shall singly or in the aggregate exceed \$5,000, except to suppress insurrection or to repel invasion, and were valid. (*Southern Pac. Co. v. Siemens*, 62.)

Counties—Actions.

2. Where the plaintiff sues under the Employers' Liability Act (Laws 1911, p. 16) for personal injuries sustained while an employee of the county, his action is one of tort resting on negligence and will not be heard, as the county can be sued only under Section 358, L. O. L., which permits suits against a county on its contracts only. (*Rapp v. Multnomah County*, 607.)

Counties—Liability for Torts—Statute—Implied Repeal.

3. Section 358, L. O. L., which limits actions against a county to causes founded on contract, is not repealed or amended by implication by the Employers' Liability Act, which fails explicitly to mention counties, since repeals by implication are not favored. (*Rapp v. Multnomah County*, 607.)

COURTS.**Courts—Record—Failure to Show Jurisdiction.**

1. A decree of a court of general jurisdiction setting aside its decree of divorce, being presumed to have been rightfully given, is admissible, though it does not show that notice of the application to open the decree was served; lack of jurisdiction neither appearing on its face nor being shown. (*State v. Locke*, 492.)

CREDITOR'S SUITS.**Creditor's Suit—Conditions Precedent—Recovery of Judgment.**

1. A creditor cannot maintain a creditor's bill to subject his debtor's equity in land to the payment of the debt before reducing his debt to judgment at law. (*Union Credit Assn. v. Corson*, 361.)

CRIMINAL LAW.**Criminal Law—Trial—Misconduct of Prosecutor—Questions.**

1. An assignment of error, charging an attempt by the district attorney, to insinuate by his questions that the defendant was a hard-

ened criminal, which was supported by 29 questions asked by him during the trial, 20 of which were not objected to at the time, and practically all of them were competent, and the remaining 9 of which were objected to and the objections sustained, does not show reversible error. (State v. O'Donnell, 116.)

Criminal Law—Appeal—Harmless Error—Irrelevant Answer to Question.

2. Where the prosecuting attorney testified to admissions by accused, an answer by him to a question on cross-examination, intended to cast insinuations on him, which was not a direct answer, but was pertinent to the subject and no more prejudicial than the question itself, does not require a reversal. (State v. O'Donnell, 116.)

Criminal Law—New Trial—Grounds—Impeachment of Witness.

3. It was not error to deny a motion for a new trial based on misconduct of the district attorney, which was not in the record, and was not excepted to, and which motion was merely an attempt to impeach the witnesses on particular facts testified to by them. (State v. O'Donnell, 116.)

Criminal Law—Appeal—Harmless Error.

4. In a prosecution for larceny of a mare, testimony of the owner of the mare concerning the man who did his branding in a certain year was wholly immaterial, and its admission over objection was harmless error. (State v. McPherson, 151.)

Criminal Law—Harmless Error—Evidence—Admissions.

5. Where the defendant, at the time of the arrest for horse-stealing, made no admissions against his interest, he was not prejudiced by the admission, over objection, of the officer's testimony as to what he had said with reference to another stolen horse. (State v. McPherson, 151.)

Criminal Law—Appeal—Objection to Evidence.

6. Where no objection was made or exception taken to the admission of immaterial testimony, error could not be predicated upon its admission. (State v. McPherson, 151.)

Criminal Law—Harmless Error—Evidence.

7. In a prosecution for larceny, testimony of two witnesses that the defendant was in the state in August and September of a certain year was not prejudicial because such time was subsequent to the date of the larceny, where there was no testimony definitely fixing the time when the crime was committed, and time testified to was prior to the date of the crime given in the indictment. (State v. McPherson, 151.)

Criminal Law—Evidence—Admissibility.

8. In a prosecution for larceny, the state could prove admissions the defendant made upon a former trial, although he was not a witness at the present trial. (State v. McPherson, 151.)

Criminal Law—Nonsuit.

9. Denial of a motion for new trial is not assignable as error on appeal. (State v. McPherson, 151.)

Criminal Law—Objections to Evidence—Waiver—Cross-examination.

10. The right to complain of an error committed in the reception of incompetent evidence over seasonable objection is not waived by the mere fact of cross-examination of the witness respecting the matter objected to. (*State v. Naylor*, 189.)

Criminal Law—Appeal—Disposition of Cause—Remand.

11. The court will not determine a criminal cause on appeal, under Article VII, Section 3, of the Constitution, as amended in 1910 (*Laws* 1911, p. 7), providing that, if the Supreme Court is of the opinion that the judgment should be changed, and that it can determine the judgment that should have been rendered, it shall direct the entry thereof, where the record shows that it will be peculiarly appropriate for the jury to pass upon the issues involved. (*State v. Naylor*, 189.)

Criminal Law—Evidence—Admissibility—Uncertified Paper.

12. In a prosecution for murder, an uncertified paper, being the deputy county clerk's memorandum, purporting to show that defendant, when arraigned, stated his true name to be another than that under which he was indicted, was incompetent, where there was a journal entry showing the arraignment, which might be proved under Section 752, L. O. L., providing that judicial records may be proved by the production of the original, or a copy thereof, certified by the clerk having custody thereof. (*State v. Louie Hing*, 462.)

Criminal Law—Appeal and Error—Review—Evidence.

13. In a murder case, an assignment of error that there was no evidence to warrant an instruction on manslaughter will not be examined, where it does not appear that the bill of exceptions contained all of the evidence. (*State v. Louie Hing*, 462.)

Criminal Law—Reception of Evidence—Scope of Objections.

14. The objection of defendant in polygamy to his wife testifying, except to the fact of marriage, is not sufficient to raise the objection of the generality of her subsequent testimony that she is married to him. (*State v. Locke*, 492.)

Criminal Law—Documents in Other State—Authenticating Copies.

15. The certification of a copy of the record of a marriage license and certificate in a county of another state, by the clerk of the Circuit Court of such county, under the seal of the court, to be correct copies of such instruments as they appear of record, with the appended certificate of the judge thereof that the copy was made and issued in due form, and that the certifying officer was the clerk, and the person having the legal custody of the original, being in compliance with Section 766, subdivision 7, L. O. L., relating to proof of documents in a sister state, renders the evidence competent. (*State v. Locke*, 492.)

Criminal Law—Documents in Other State—Authenticating Copies.

16. Any necessity of proof of the statute of another state authorizing such a record, before a certified copy of the record of a marriage license and certificate therein can be introduced, is satisfied by the statement of the judge in his appended certificate that the certifying clerk was the legal custodian of the original. (*State v. Locke*, 492.)

Criminal Law—Admission—Marriage—Divorce Decree.

17. Introduction by defendant in polygamy of a copy of a decree of divorce, of him from another is an admission of his having been married to such person. (State v. Locke, 492.)

Criminal Law—Evidence Admissible by Reason of Other Evidence.

18. Defendant in polygamy having introduced a decree of divorce, the state may introduce one setting it aside, though incidentally it shows his unfairness in obtaining his decree by stealth. (State v. Locke, 492.)

CRIMINAL PROSECUTION.**Grounds for Restraining Under Void Legislation.**

See Injunction, 1.

CROSS-APPEAL.**Respondent Presumably Satisfied With Decree.**

See Appeal and Error, 8.

CROSS-EXAMINATION.

See Criminal Law, 10.

See Evidence, 10.

See Witnesses, 3.

CUSTODY OF CHILDREN.

See Divorce, 1, 2.

DAMAGES.**Damages—Instructions—Validity.**

1. An instruction that the jury should disregard any feelings of sympathy because of plaintiff's injuries, but that, if plaintiff had a good cause of action, the jury should not steel themselves not to be sympathetic, it being the duty of the jury to exercise their hearts as well as brains, is erroneous, practically directing verdict according to the jury's sympathies. (Kveset v. Grace & Co., 83.)

Damages—Personal Injuries—Permanent Injury—Evidence.

2. Testimony of a physician that in some respects the injury to the arm of plaintiff suing for a personal injury was permanent authorized an instruction on permanency of the injury in determining the damages. (Lang v. Camden Iron Works, 137.)

Damages—Interest—Allowance—Unliquidated Damages.

3. In an action on a surety bond for unliquidated damages, interest cannot be allowed. (Williams v. Pacific Surety Co., 210.)

Damages—Personal Injury—Lost Time.

4. Lost time resulting from a servant's injury, together with the deprivation of wages, constitutes an element of damages recoverable in his action under the Employers' Liability Act. (Ingram v. Carlton Lumber Co., 633.)

See Appeal and Error, 6.

See Fraud, 6, 7.

See Negligence, 1.

Measure of Damages for Breach of Contract.

See Logs and Logging, 1.

DEATH.

Death—Action—Party Entitled to Sue—Administrator.

1. The administrator of a deceased employee is incompetent to maintain an action against the employer for damages, for the death, when it is alleged to have been caused by such employee's negligence. (*Evansen v. Grande Ronde Lumber Co.*, 1.)

Death—Executors and Administrators—Actions—Employers' Liability Act—Persons Entitled to Sue.

2. An administrator may not settle a claim under the Employers' Liability Act (Laws 1911, p. 16) for the death of his intestate, or sue therefor, but that right is vested by law in the surviving widow of decedent. (*Franciscovich v. Walton*, 36.)

Death—Action for Death—Statutory Provisions—Construction.

3. Section 380, L. O. L., providing that, where death of a person is caused by the wrongful act of another, the personal representative of decedent may sue at law therefor, if decedent, had he lived, could have sued for an injury done by the same act, is not repealed by Employers' Liability Act, but the two must be construed together, and, as far as possible, effect must be given to the provisions of each, but the provision in the Employers' Liability Act, enumerating the persons entitled to sue for death, is exclusive of Section 380, so long as any one of the persons named therein survive, but, in case none survive, the representative of decedent may sue under Section 380. (*Niemi v. Stanley Smith Lumber Co.*, 221.)

See Master and Servant, 2.

DECLARATIONS.

See Evidence, 5, 9.

DEEDS.

Deeds—Fraud—Evidence—Sufficiency.

1. Evidence held to justify a finding that a deed was procured by fraud. (*Jones v. Sheffer*, 284.)

Deeds—Fraud—Ratification—Evidence.

2. Evidence held not to justify a finding that a grantor, induced by fraud to execute a deed, ratified the conveyance, so as to prevent him from suing to set it aside for the fraud. (*Jones v. Sheffer*, 284.)

Title of Grantee in Deed Constituting a Mortgage.

See Mortgages, 1.

DEFINITIONS.

See Words and Phrases.

DEMURRER.

See Abatement and Revival, 1.

See Indictment, 1.

See Mandamus, 1, 3.

Pleading Over After Demurrer to Complaint is Overruled.

See Appeal and Error, 20.

DEPARTURE.**What Constitutes.**

See Pleading, 3.

DESCRIPTION.

See Mechanics' Liens, 7.

DIMINUTION OF RECORD.

See Appeal and Error, 11.

DISBARMENT.

See Attorney and Client, 1, 2.

DISMISSAL AND NONSUIT.**Dismissal and Nonsuit—Defects in Pleadings.**

1. Where plaintiff, in a suit to establish his title by adverse possession to a strip of land covered by his wall and sidewalk, failed to plead the actual title which his evidence tended to prove, and did not allege the estoppel by reason of an agreement as to a boundary line which he attempted to show at the trial, and his claim of adverse possession had been broken by unity of both estates, and defendant showed no title in himself and claimed no damages, the court could not render substantial justice without disregarding the pleadings, and would dismiss without prejudice to another suit. (*Joy v. Palethorpe*, 552.)

DIVORCE.**Divorce—Custody of Child—Relative Means of Parents.**

1. Where both parents were proper persons for the custody of their child, the fact that the father was better able financially to raise the child than the mother, who was obliged to work to earn a living, was not ground to give him the custody of such child, a daughter, as against the mother, successful in her suit for divorce; since nothing prevented the father from contributing more to the maintenance of the child than the amount directed by the decree, if his means permitted. (*McKay v. McKay*, 14.)

Divorce—Custody of Child—Modification of Decree.

2. When a change in a decree of the Circuit Court in a divorce suit as to the custody of the child becomes justifiable in the future, the decree may be modified. (*McKay v. McKay*, 14.)

See Criminal Law, 17.

DOCUMENTS.

See Criminal Law, 15, 16.

DOCUMENTARY EVIDENCE.

See Evidence, 2.

DOWER.

Dower—Action for Rent—Liability of Tenant.

1. Section 7297, L. O. L., entitles a widow to dower in lands of which her husband died seised, and authorizes her to continue to occupy the lands or receive half of the rents so long as the heirs or others interested do not object, without having dower assigned. Dower was assigned to a widow, who leased the property assigned to a tenant. Subsequently the assignment was set aside, and new commissioners were appointed to make a new admeasurement, which was confirmed nearly a year later. No one objected to the widow's receiving the rent of the land first assigned to her, but all acquiesced therein. The executor testified that the estate did not claim or collect any of the rent. *Held*, that the widow was entitled to collect the rent. (*Martin v. Fletcher*, 408.)

DUE PROCESS OF LAW.

See Constitutional Law, 1, 6.

ELECTIONS.

See Municipal Corporations, 9, 10, 11.

EMINENT DOMAIN.

Eminent Domain—Streets—Property Right of Abutting Owner.

1. An abutter who owned the fee of a street has a right to use that street to gain access to his property different from the rights of other members of the public, and, having such property right, he cannot be deprived thereof by a railroad company until he receives compensation for his damages as provided by Article I, Section 18 and Article XI, Section 4, of the Constitution. (*Tooze v. Willamette Valley S. Ry. Co.*, 157.)

EMPLOYERS' LIABILITY ACT.

See Death, 2.

See Master and Servant, 1, 7, 15, 17, 20, 27, 29, 31-35, 37.

See Negligence, 1.

See Trial, 1.

EQUAL PROTECTION OF LAW.

See Constitutional Law, 7, 8.

EQUITABLE ESTOPPEL.

See Estoppel, 1, 2.

EQUITY.

See Partition, 1-4.

See Taxation, 1.

ESTOPPEL.

Estoppel—Equitable Estoppel—What Constitutes.

1. In a suit by a vendor to cancel a vendee's contract, the vendor *held* estopped to assert his rights as against purchasers of part of the parcel contracted to be sold; such purchasers having entered into the

agreement in reliance on the vendor's representations. (*Beno v. Norris*, 506.)

Estoppel—Equitable Estoppel—Defenses.

2. Where a vendor assured purchasers of part of the parcel from the vendee that they were safe in buying, such purchasers were not estopped, though they did not investigate the county records to ascertain what title their vendor and his grantor had. (*Beno v. Norris*, 506.)

See Boundaries, 1, 2.

See Landlord and Tenant, 5.

See Municipal Corporations, 23.

EUGENE, CHARTER OF.

See Pullen v. Eugene, 320.

EVICTIION.

See Landlord and Tenant, 10-12.

EVIDENCE.

Evidence—Opinion—Expert—Logging Company Employee.

1. The superintendent of a logging company's railway was competent to testify whether it was necessary for members of the crew of a logging train to travel over the cars when in motion in the discharge of their duties, since men in railroad service may express opinions upon questions in relation thereto, involving matters not within the knowledge of ordinary jurors. (*Evansen v. Grande Ronde Lumber Co.*, 1.)

Evidence—Documentary Evidence—Parol Evidence to Vary.

2. A statement of loss furnished to the insurer may be explained by parol evidence, where it was not one which was necessary to be in writing. (*Smith v. National Surety Co.*, 17.)

Evidence—Opinion Evidence—Acts and Issues.

3. In an action by a servant for injuries from the alleged viciousness of a horse given him to drive, opinion evidence that the horse was not a safe one for the work was wrongfully admitted; that being a question for the jury. (*Marks v. Columbia County Lumber Co.*, 22.)

Evidence—Opinion Evidence—Disposition of Animal.

4. The habits, characteristics and disposition of the horse are matters of such common knowledge that it would not require expert testimony to determine whether a horse was safe for certain work. (*Marks v. Columbia County Lumber Co.*, 22.)

Evidence—Declarations of Servant—Authority to Bind Master.

5. Merely evidence that declarant was a foreman in charge of laborers engaged in handling lumber and piling it in the yard and dock did not show authority on his part to admit liability of his master; and it was error to admit evidence that, several days after the accident, he stated that it was his fault, in that he did not warn the man. (*Marks v. Columbia County Lumber Co.*, 22.)

Evidence—Judicial Notice—Facts of Common Knowledge.

6. The court will take judicial notice of the fact that Bulgaria is an independent kingdom, and that a subject thereof is not a national of Russia. (Francisovich v. Walton, 36.)

Evidence—Admissions—Pleadings—Action for Deposit.

7. Where, in a tenant's action for a sum deposited as security for payment of rent, plaintiff alleged that a surrender of the lease had been accepted by defendant by reletting the premises, the complaint filed by the landlord in an action against the person to whom the premises were alleged to have been relet was admissible in evidence, where it contained admissions against the interest of the landlord in the instant case. (Meagher v. Eilers Music House, 70.)

Evidence—Parol Evidence to Vary Writing.

8. Where a contract for the sale of land has been reduced to writing and the mutual obligations of the parties specified, the purchaser cannot vary or alter the written contract by showing contemporaneous parol agreements without alleging and proving that some fraud was practiced upon him to prevent such agreement from being inserted in the written contract. (Western Oregon Trust Co. v. Hendricks, 104.)

Evidence—Declarations—Res Gestae.

9. In an action for injuries to an employee by the fall of a gin pole, evidence that just before the accident, and while the gin pole was being used, the foreman in immediate charge of the work directed a teamster occupying a position on the ground immediately at the foot of the structure to move to another place because the pole might fall down on the team, was admissible as a part of the *res gestae*. (Lang v. Camden Iron Works, 137.)

Evidence—Cross-examination of Expert—Personal Injuries.

10. Where a physician testified on direct examination that plaintiff suing for personal injuries would probably have as good an arm as ever, and that the injuries were not permanent, a question on cross-examination whether the physician, aside from the pain and inconvenience, would just as soon that his arm should be in the condition in which plaintiff's arm was, was improper. (Lang v. Camden Iron Works, 137.)

Evidence—Materiality—Admissibility.

11. Where the time when papers were executed was in issue, the papers themselves are properly received in evidence. (Williams v. Pacific Surety Co., 210.)

Evidence—Construction.

12. Where a contract provided that both parties should procure and deliver to the other, as security, bonds in the sum of \$25,000, or, in lieu thereof, other security satisfactory to the parties, mortgages given by plaintiff instead of a surety bond should be received in evidence showing the way in which the parties construed the contract. (Williams v. Pacific Surety Co., 210.)

Evidence—Judicial Notice—Gas—Explosion.

13. In an employee's action for injuries from the explosion of a gas stove, the court will take judicial notice that gas used for fuel is

so inflammable that the moment a flame is applied it will immediately ignite with an explosion, if present in any considerable volume. (Holmberg v. Jacobs, 246.)

Evidence—Opinion Evidence—Hypothetical Question—Basis.

14. The answer elicited in response to a hypothetical question propounded to a witness on cross-examination was not available as evidence, where it was not based on evidence corresponding with the hypothesis advanced. (Holmberg v. Jacobs, 246.)

Evidence—Opinion Evidence—Speed of Automobile.

15. Witnesses who have operated or had occasion to observe the velocity of automobiles may be permitted to give their opinion as to speed of an automobile which ran down and injured a person in a highway. (Kelly v. Weaver, 267.)

Evidence—Judicial Notice—Laws of Nature.

16. While, under Section 729, subd. 8, L. O. L., declaring that judicial notice is taken of the laws of nature, the court may reject testimony irreconcilable with physical facts, conclusively established, or instruct that it be disregarded, it cannot do so as to reasonable testimony, where there is a question for the jury whether or not witness' means of observation were such as to entitle his testimony, as to what was the speed of an automobile, seen at some distance and for a comparatively short space, to be worthy of belief. (Kelly v. Weaver, 267.)

Evidence—Parol Evidence—Contracts—Consideration.

17. Under Section 798, subdivision 3, L. O. L., providing that the truth of facts recited in a written instrument is conclusively proved as between the parties thereto, but this rule does not apply to the recital of a consideration, a consideration expressed in a writing may be inquired into. (United States Fidelity Co. v. Martin, 369.)

Evidence—Parol—Assignment of Lease.

18. In an action for rent, parol evidence of an assignment of the lease to a third person was admissible to show the relation and understanding of the parties. (Hotel Marion Co. v. Waters, 426.)

Evidence—Parol Evidence to Vary Writing.

19. When any fact or transaction exists which raises an equity between an indorser and an indorsee and shows it to be inequitable to enforce the written contract, there arises an exception to the general rule that parol evidence will not be admitted to vary the contract of a blank indorsement. (Moll v. Roth Co., 593.)

Evidence—Parol Evidence to Vary Writing.

20. An agreement by an indorser of a note to attend to its collection for the indorsee was not in conflict with or contradiction of the written blank indorsement, where it was shown that this obligation was a subsequent transaction. (Moll v. Roth Co., 593.)

Evidence—Opinion Evidence—Expert Testimony.

21. An experienced furniture dealer who had inspected in a store a stock of furniture insured is competent to testify as to its value and that it was worth the amount of the policy, where the invoices were destroyed. (Willis v. Horticultural Fire Relief, 621.)

See Account, 1.
 See Animals, 1.
 See Appeal and Error, 1, 7, 26, 29, 39, 40.
 See Assignments, 1.
 See Attorney and Client, 1, 3.
 See Bigamy, 4.
 See Bills and Notes, 5.
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 See Criminal Law, 5-8, 10, 12-14, 18.
 See Damages, 2.
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 See Lewdness, 1.
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 See Partition, 1, 4.
 See Principal and Agent, 2.
 See Principal and Surety, 1.
 See Trial, 4, 6.
 See Trusts, 1.
 See Vendor and Purchaser, 1, 5.
 See Witnesses, 6.

Negative Evidence.

See Master and Servant, 2.

Rulings on Admission of Evidence.

See Appeal and Error, 13.

EXCEPTIONS.

See Appeal and Error, 16.

EXCEPTIONS, BILL OF.

Exceptions, Bill of—Bystanders' Bill—"Disinterested Witness."

1. Under Section 170, L. O. L., declaring that if an objection is made to any ruling, and the truth of the statement thereof is not agreed upon between counsel and the court, counsel may verify his statement on his own oath and that of two disinterested witnesses, the brother of a party to the action is not a "disinterested witness" competent to verify counsel's oath. (*Fitzhugh v. Nirschl*, 514.)

Exceptions, Bill of—Bystanders' Bill—Mode of Preparing.

2. Section 170. L. O. L., relating to bystanders' bills of exceptions, and providing that affidavits of counsel and disinterested witnesses shall be taken before the clerk, and his certificate attached, is mandatory, and where not so taken the bill cannot be considered. (*Fitzhugh v. Nirschl*, 514.)

See Appeal and Error, 11, 13, 14, 22.

EXCHANGE OF PROPERTY.**Exchange of Property—Realty—Rescission of Contract—False Representations.**

1. Where plaintiff and defendant exchanged realty, and defendant falsely represented to plaintiff, who told him that he was ignorant of soils and their qualities, that the land which he was to receive was not white land and would not require drainage, the contrary being the fact, but plaintiff being ignorant thereof, plaintiff could rescind such contract for false representations. (Held v. Kennedy, 526.)

EXECUTORS AND ADMINISTRATORS.**Executors and Administrators—Appointment—Irregularity—Right to Object.**

1. The appointment of a stranger as administrator of a decedent, leaving a wife and heirs at law in a foreign country, made within 30 days after decedent's death and within the time which the widow, heirs at law and creditors have a prior right to apply for appointment, is technically irregular, and will be revoked on application of any of those having a prior right, but another stranger may not maintain a petition to revoke the appointment and obtain his own appointment. (Franciscovich v. Walton, 36.)

See Death, 2.

Of Deceased Employee Incompetent to Maintain Action.

See Death, 1.

EXPERT TESTIMONY.

See Appeal and Error, 2.

See Evidence, 1, 21.

Cross-examination of Expert Witness.

See Evidence, 10.

FINDINGS.

See Appeal and Error, 21, 26, 41.

Failure of Trial Court to File Findings, Harmless Error.

See Appeal and Error, 30.

FORECLOSURE.

See Mechanics' Liens, 3, 4, 6-9.

FOREIGN JUDGMENTS.

See Judgment, 3.

FRAUD.**Fraud—Pleading—Complaint—Sufficient.**

1. The complaint in an action for fraud, inducing plaintiffs to exchange their city residence property for acreage land of defendants, which alleges that plaintiffs were ignorant of farming land and strangers to the real estate and locality where such land was situated, that, on arriving at the land, a defendant represented that a part thereof was fit for cultivation, and that it was not necessary

for plaintiffs to inspect the land, but that they could rely on the representation of defendant, and that the representation was false, and that defendant knew of the falsity, and that plaintiffs relied on the representations, states a cause of action. (*Aitken v. Bjerkvig*, 397.)

Fraud—Actionable Fraud.

2. Where parties deal at arm's-length and have equal opportunity to ascertain the truth as to the quality of the property involved, and no reliance is placed on the representations made by the vendor, the purchaser must take the consequences of his own neglect, and may not rely on the vendor's representations. (*Aitken v. Bjerkvig*, 397.)

Fraud—Fraudulent Representations—Statement of Facts Recklessly Made.

3. One making a false statement of fact recklessly, without knowledge of its truth or falsity, and with intent to influence a transaction and actually influencing it, is liable for fraud. (*Aitken v. Bjerkvig*, 397.)

Fraud—Fraudulent Representations—Reliance on Representations.

4. A false statement by a vendor of agricultural land as to the quality thereof, made to induce a purchaser ignorant of the quality and values of agricultural land, and actually relied on by him, is actionable, for the purchaser could rely on the representations. (*Aitken v. Bjerkvig*, 397.)

Fraud—Actionable Fraud—Evidence.

5. In an action for fraud in inducing plaintiffs to exchange their city residence property for agricultural land, evidence held to require submission to the jury of the issues. (*Aitken v. Bjerkvig*, 397.)

Fraud—Fraudulent Representations—Damages.

6. Where defendants fraudulently represented that there were 30 acres of arable land on a tract conveyed to plaintiffs in exchange for their city residence property, while there were only 7 or 8 acres of arable land, and the rest of the land was not capable of being cultivated without great additional expense, the jury could award substantial damages for the fraud. (*Aitken v. Bjerkvig*, 397.)

Fraud—Diseased Animals—Sale—Measure of Damages.

7. In an action for damages to a herd of cattle, which the buyer claimed were sold when infected with a disease, where there was no evidence that animals, other than those which died, were affected, the buyer's measure of damages was the value of the dead cattle, which should be computed as if they had been in a good condition. (*Fitzhugh v. Nirschl*, 514.)

Fraud—Diseased Animals—Damages—Complaint—Restrictions.

8. Where a buyer's complaint averred that the cattle sold were infected with a disease known as "black-leg," no recovery for damages sustained from other diseases can be had; the complaint having limited the issues. (*Fitzhugh v. Nirschl*, 514.)

Fraud—Fraudulent Concealment.

9. Where a seller of animals, knowing that they have a latent disease, which affects their value, of which the buyer is ignorant, conceals it, he is liable for damages. (*Fitzhugh v. Nirschl*, 514.)

See Deeds, 1, 2.
 See Principal and Agent, 1.
 See Release, 1.
 See Vendor and Purchaser, 5, 6.

FRAUDS, STATUTE OF.

See Statute of Frauds.

FRAUDULENT CONVEYANCES.

Fraudulent Conveyances—Elements of Fraud—Transfer to Co-owner.

1. Where plaintiff's debtor and another jointly owned an equity in certain land, the payment on which was due, and the debtor could not pay his share thereof, an agreement whereby he conveyed his interest to his co-owner, who mortgaged the land to raise the money necessary to complete the payment, and gave the debtor a contract to convey his interest to him upon his paying his share of the purchase price, shows no intention to defraud plaintiff, since his debtor's equity was still subject to the payment of his debt. (*Union Cred. Assn. v. Corson*, 361.)

GARNISHMENT.

Garnishment—Jurisdiction—Complaint.

1. A complaint, labeled "Allegations and Interrogatories," which set up that the defendant was indebted to the garnishee, is sufficient to give the court jurisdiction of the garnishment proceeding, though no interrogatories were filed. (*Mann v. W. A. Gordon Co.*, 457.)

GAS.

Injuries from Explosion of Gas.

See Evidence, 13.

GRAND JURY.

Grand Jury—Proceedings—Disclosure—Statements by Defendant.

1. Section 1427, L. O. L. giving the grand jurors immunity from being questioned as to what took place in their room, and Section 1431, prohibiting the disclosure of any fact concerning the indictment while it is not subject to public inspection, which are the only provisions for the secrecy of grand jury proceedings, do not prevent the prosecuting attorney from testifying at the trial as to statements made by defendant in the grand jury room. (*State v. O'Donnell*, 116.)

GUARDIAN AD LITEM.

See Infants, 1.

HARMLESS ERROR.

See Appeal and Error, 1, 3, 5, 7, 27, 30, 31, 39.
 See Criminal Law, 2, 4, 5, 7.

HAWKERS AND PEDDLERS.

Hawkers and Peddlers—"Peddler"—Who is.

1. One who, by displaying samples, solicits orders for the sale of goods for future delivery, is not, as a general rule, a "peddler." (*Ideal Tea Co. v. Salem*, 182.)

HIGHWAYS.**Highways—Road Districts—Statutes—Amendment—Setting Out Provision.**

1. Laws of 1915, page 133, chapter 127, Section 1, amended Section 6313, L. O. L., and made imperative the Constitution of every incorporated city and town as a separate road district. Laws of 1915, page 255, chapter 194, subsequently enacted, without mention of Chapter 127, amended the same statute in other respects, but left such action discretionary, and set out the statute after the words "so as to read as follows." *Held*, that it was an entire obliteration of the former statute, Chapter 127 being repealed whether in conflict with Chapter 194 or not, so that action under Chapter 127 could not be enforced, as the omitted provisions could not be revived by judicial interpretation, since to so add an omitted provision would violate Article IV, Section 22, of the Constitution, requiring the amended law to be set forth at length. (State ex rel. v. Lightner, 587.)

HUSBAND AND WIFE.

See Criminal Law, 14-18.

Competent to Testify Against Each Other.

See Witnesses, 5.

HYPOTHETICAL QUESTION.

See Evidence, 14.

IMMORAL ADVERTISING.

See Obscenity, 1, 2.

See Constitutional Law, 8, 9.

IMPEACHMENT.

See Criminal Law, 3.

See Witnesses, 1, 2, 4.

INDEPENDENT CONTRACTORS.

See Master and Servant, 12, 13.

INDICTMENT.**Indictment—Complaint—Demurrer.**

1. As a statute not in conformity with the Constitution must be disregarded, a demurrer to a criminal complaint charging a violation of a statute raises the question whether the statute itself is valid. (State v. Nicholls, 415.)

Indictment—Allegations—Place of Offense.

2. An indictment charging that defendant, in the county of L. then and there being, and having a wife living in P., then and there cohabited with another woman as his wife, charges the commission of the crime in L., and not in P. (State v. Locke, 492.)

See Obscenity, 1.

INFANTS.**Infants—Guardian ad Litem—Adverse Interest.**

1. In a proceeding for the partition of lands, the appointment of the mother of one of the infant heirs as its guardian *ad litem* will not avoid the decree, though it would have been better to have appointed someone not interested; the court having jurisdiction of the proceedings, and there being no taint of fraud. (Howell v. Howell, 539.)

INITIATIVE AND REFERENDUM.

See Municipal Corporations, 4, 9, 11, 12.

INJUNCTION.**Injunction—Restraining Criminal Prosecutions Under Void Legislation—Grounds.**

1. Where prosecution under a void regulation relating to a misdemeanor is threatened, and the attempted enforcement of the regulation will deprive plaintiff of a valuable property right, he may sue to enjoin the prosecution. (Ideal Tea Co. v. Salem, 182.)

Injunction—Adequate Remedy at Law.

2. Where the owner of land sought to be condemned as a school site contended that the majority vote whereby the voters of the district selected such site was not valid, a two-thirds vote being required by statute, she could not maintain her injunction suit against the school board to restrain it from the condemnation, since the defense could be set up in the condemnation proceedings themselves, as one attempting to acquire the property of another by eminent domain must, as a condition precedent, show authority. (Landers v. Van Aukin, 479.)

Injunction—Remedy at Law—Cancellation of Instruments.

3. In ejectment, the defendant alleged that he could not succeed unless a certain plat of lands was canceled. He therefore brought a bill in equity to stay proceedings at law, and prayed cancellation of the plat. Demurrer was filed to his bill on the ground that it did not state a cause of action. *Held*, that the demurrer should have been overruled, since the defendant did not have a plain, adequate and complete remedy at law. (Miller v. Fisher, 532.)

See Taxation, 1.

Enjoining Action at Law.

See Abatement and Revival, 1.

Injunction Pending Appeal.

See Appeal and Error, 28, 35.

INSOLVENCY.

See Assignment for Benefit of Creditors, 1.

INSTRUCTIONS TO JURIES.

- See Appeal and Error, 14, 27.
- See Carriers, 1.

See Damages, 1.
 See Landlord and Tenant, 9.
 See Master and Servant, 22.
 See Trial, 2, 3, 5, 7-9.

INSURANCE.

Insurance—Theft Insurance—Complaint—Sufficiency.

1. A policy was conditioned for protection against direct loss by burglary, theft or larceny of any property described in the schedule, occasioned by its felonious abstraction from the interior of the premises occupied by the insured. A complaint averred that while the policy was in force there was taken from insured's apartment, without her consent, by one B., who surreptitiously and fraudulently obtained access to the apartment, jewelry of a value greater than \$1,500, none of which had been recovered. It appeared that B. by misrepresentations acquired possession of the property, which he never returned. *Held*, that the complaint was sufficient to state a cause of action, there being under Section 799, L. O. L., a presumption of ownership from insured's possession and the complaint charging larceny, burglary or theft rather than the obtaining of the property under false pretenses. (*Smith v. National Surety Co.*, 17.)

Insurance—Theft Insurance—Actions—Evidence.

2. In an action on a theft policy to recover the value of jewels which were obtained from plaintiff by fraud, evidence of her reason for surrendering possession of the jewels was admissible to show that the property was really stolen. (*Smith v. National Surety Co.*, 17.)

Insurance—Fire Insurance—Title of Insured.

3. Where a policy of fire insurance was issued under Section 4666, L. O. L., as amended by Laws of 1911, page 279, regulating the conditions to be contained in such policies, no agreement or memorandum being attached thereto providing for the insurance of any interest less than the sole and unconditional ownership of the person named as assured, nor permitting the insurance of the building upon ground in which the insured had other than a fee-simple title, as required by the statute to effect such insurance, and of the two persons assured, who were operating the insured fruit cannery, one had purchased a half interest in the property as trustee with funds of his father's estate, of which he was an executor, under a will whereby the widow had equal title to the *corpus* of the estate with the executors, and could only be deprived of it by her own act, he could not recover upon the policy, as his interest in his share of the property was less than sole ownership. (*Howard v. Horticultural Fire Relief*, 349.)

Insurance—Fire Policies—Actions—Evidence.

4. In an action on a fire policy where it was contended that false statements in the proofs of loss avoided the policy and precluded recovery, the question whether the statements were intentionally false so as to prevent recovery *held*, under the evidence, for the jury. (*Willis v. Horticultural Fire Relief*, 621.)

Insurance—Fire Policies—Proofs of Loss.

5. Where a fire policy provided that any false statements or false swearing by the insured relating to the insurance or subject matter

before or after loss should avoid the policy, unintentional false statements in the proofs of loss will not preclude recovery. (*Willis v. Horticultural Fire Relief*, 621.)

INTENT.

See Landlord and Tenant, 10.

INTEREST.

No Interest Allowed on Unliquidated Damages.

See Damages, 3.

INTOXICATING LIQUORS.

Intoxicating Liquors—Offenses.

1. The home rule amendment (Article XI, Section 2), giving to a city exclusive control of the sale of intoxicating liquors within its corporate limits, subject to the Constitution and criminal laws of the state, does not prevent a prosecution for the violation, within the city of Section 2129, L. O. L., as amended by Laws of 1913, Chapter 74, prohibiting the sale of intoxicating liquor on Sunday. (*State v. O'Donnell*, 116.)

Intoxicating Liquors—Offenses—Statute—Sale on Sunday.

2. In Section 2129, L. O. L., as amended by Laws of 1913, Chapter 74, providing that no person shall keep open on Sunday a house or room in which intoxicating liquor is kept for sale, nor shall such person sell intoxicating liquor on that day, the words "such person" refer to the first two words, and the statute is not limited to sales by persons who keep a house or room for the sale of intoxicating liquor. (*State v. O'Donnell*, 116.)

Intoxicating Liquors—Offenses—Sale on Sunday—Evidence.

3. In a prosecution under Section 2129, L. O. L., as amended by Laws of 1913, Chapter 74, prohibiting the sale of liquor on Sunday, evidence as to who kept the place in which the sale was made is immaterial. (*State v. O'Donnell*, 116.)

Intoxicating Liquors—Offenses—Furnishing Liquor to Convicts.

4. Under Laws of 1913, page 266, making it an offense to give, sell or furnish intoxicants to any person sentenced to serve a term in the penitentiary, the fact that defendant did not know the person to whom he was furnishing intoxicants was a convict is no defense; the crime being wholly statutory. (*State v. Perry*, 453.)

JOINT ADVENTURES.

Joint Adventures—Action Between Parties—Relief Awarded.

1. Where a physician represents that he will put in \$2,000 for a \$4,000 purchase of property, if his patient put in the other \$2,000, and the physician buys the property, but mortgages it for his share and takes the title in his name, conveyance of an undivided one half will be decreed the patient, without prejudice to any rights she may have on account of damage by reason of the mortgage. (*McNiell v. Holmes*, 165.)

JUDGMENT.

Judgment—Lien—Equity.

1. The fact that plaintiff had a judgment against his debtor which was no lien upon the debtor's equity in the land gave him no rights thereto superior to those of the co-owner. (Union Credit Assn. v. Corson, 361.)

Judgment—Conclusiveness—Former Adjudication.

2. A defendant in an action in a court of a sister state procured from a surety company a bond for the release of property attached by plaintiff therein. A third person executed to the surety company an indemnity bond conditioned on saving it harmless against all suits, actions, debts, damages, charges and expenses. Plaintiff in the action recovered judgment subsequent to his agreement to dismiss, in consideration of a payment in full settlement by defendant who had no knowledge of the trial. The third person had notice of the trial and participated therein. *Held* that, under the full faith and credit clause of the Constitution, the judgment was conclusive against the third person on his bond to indemnify the surety company satisfying the judgment, though the third person sought to show that under the laws of the sister state a new trial could be had against a judgment obtained by fraud or surprise, and that the surety company refused to take any action to obtain a new trial. (United States Fidelity Co. v. Martin, 369.)

Judgment—Foreign Judgment—Conclusiveness.

3. Under the full faith and credit clause of the federal Constitution and Section 761, L. O. L., providing that the effect of a judicial record of a sister state is the same in this state as in the sister state, the court may inquire whether a court of a sister state rendering a judgment relied on had jurisdiction of the parties and of the subject matter, but beyond that it cannot go. (United States Fidelity Co. v. Martin, 369.)

Judgment—Rendition—Time.

4. Notwithstanding Section 201, L. O. L., declaring that, if trial is by jury, judgment shall be given by the court in conformity to verdict, and so entered on the day on which it was returned, the court may, where judgment was not entered according to its order, render judgment a little over a month later, and then grant the unsuccessful party a new trial, for the statute is not mandatory, and the delay was not so unreasonable as to deprive the court of jurisdiction. (Fisher v. Portland Ry., L. & P. Co., 529.)

See Creditor's Suit, 1.

JUDICIAL NOTICE.

See Evidence, 5, 13, 16.

JUDICIAL POWER.

See Constitutional Law, 10.

JURISDICTION.

See Courts, 1.

See Garnishment, 1.

KNOWLEDGE.**Facts of Common Knowledge.**

See Evidence, 6.

LANDLORD AND TENANT.**Landlord and Tenant—Deposit to Secure Rent—Action to Recover—Burden of Proof.**

1. Where the lessee, suing for a deposit made as security for the rent, admits execution of the lease, but alleges that on his abandonment of the premises the lessor, under a provision of the lease authorizing him, on five days' default in payment of the monthly rent, to enter and repossess himself as of his former estate, entered on the premises or leased them to another, the burden is on the lessee to prove his discharge from the obligations of the lease by the act of the landlord. (*Meagher v. Eilers Music House*, 70.)

Landlord and Tenant—Action for Deposit—Nonsuit.

2. Where the evidence in a tenant's action for a sum deposited as security for rent showed a reletting of the premises by the landlord such as could amount to a taking of repossession by him, and did not show that the reletting was subject to the rights of plaintiff or for his benefit a motion for a nonsuit should have been denied. (*Meagher v. Eilers Music House*, 70.)

Landlord and Tenant—Surrender of Lease—Acceptance.

3. Where a tenant offers to surrender, and the landlord, without expressly accepting the surrender, relets to another, an acceptance may be implied, and the tenant released from liability for rent after the reletting. (*Meagher v. Eilers Music House*, 70.)

Landlord and Tenant—Action for Rent—Reasonable Rent.

4. A complaint in an action for rent, which alleges that plaintiff leased to defendant for a season a 63-acre tract, that defendant agreed to farm the tract and pay as rental \$4 per acre for 45 acres of tillable land and the customary rental for 11.5 acres of hops, and that the customary rental of hop-yards was half of the proceeds of the sale of the hops after a specified deduction for the cost of raising and baling, and which sets forth the amount of hops produced, states a cause of action for the reasonable rent of the hop tract, and not for the amount of rent shown to be due by custom, and a charge authorizing a recovery only on proof of a custom as to rentals was erroneous. (*Martin v. Fletcher*, 408.)

Landlord and Tenant—Action for Rent—Estoppel.

5. Where a widow leased land assigned to her as dower, though subsequently the assignment was declared illegal, the tenant was estopped to deny that the widow had title to the premises or the right to rent the same; the tenant not being ousted from the premises nor compelled to pay rent to any other person. (*Martin v. Fletcher*, 408.)

Landlord and Tenant—Action for Rent—Complaint—Evidence—"Usual"—"Customary"—"Reasonable."

6. A complaint, in an action for rent, which alleges that plaintiff let to defendant a specified tract and that defendant agreed to pay as rental \$4 per acre for a part of the land and the customary rental

for a hop tract, justifies evidence of the reasonable rental value of the hop tract, as against the objection that plaintiff sought a recovery for rental as fixed by custom; there being a close relation between the words "customary," "usual," and "reasonable." (*Martin v. Fletcher*, 408.)

Landlord and Tenant—Title of Landlord—Right of Tenant to Question.

7. One who holds as tenant of another, by treating with her and trying to settle with her attorney in fact when the time came to make a settlement, is, under Section 798, subd. 5, L. O. L., precluded from questioning the landlord's title. (*Martin v. Fletcher*, 408.)

Landlord and Tenant—Action for Rent—Evidence—Receipts.

8. Where, in an action for rent, plaintiff denied having accepted or recognized as a tenant a person to whom defendant sublet the premises, and introduced evidence to explain receipts given by it to the subtenant, such receipts, on being offered by defendant, were properly admitted in evidence. (*Hotel Marion Co. v. Waters*, 426.)

Landlord and Tenant—Action for Rent—Surrender of Lease—Instruction.

9. Where, in an action for rent, defendant contended that there had been a surrender of the lease by operation of law, a requested instruction implying that to constitute a surrender there must be an express agreement of the parties was properly refused. (*Hotel Marion Co. v. Waters*, 426.)

Landlord and Tenant—Eviction—Intent.

10. Where the action of a landlord constituted an interference with the tenant's enjoyment of the premises, the intent with which the landlord acted was immaterial to the question whether such interference constituted an eviction. (*Hotel Marion Co. v. Waters*, 426.)

Landlord and Tenant—"Eviction"—Act of Permanent Character.

11. To constitute "eviction" of a tenant by act of the landlord, the act need not be of a permanent character, but it is sufficient that it deprive the tenant of the free enjoyment of the premises or some part thereof or appurtenances thereto. (*Hotel Marion Co. v. Waters*, 426.)

Landlord and Tenant—Eviction—Question for Jury.

12. In an action for rent, the question whether acts complained of by defendant must have persisted at the moment of actual abandonment in order to constitute an eviction was for the jury. (*Hotel Marion Co. v. Waters*, 426.)

Liability of Tenant.

See *Dower*, 1.

LARCENY.

Larceny—Offenses—What Constitutes.

1. Consent of the owner, obtained by fraud, to the taking of his property does not prevent the taking from being larceny. (*Smith v. National Surety Co.*, 17.)

Larceny—Place of Theft—Question for Jury.

2. In a prosecution for the larceny of a mare, whether the mare was taken in the county alleged held for the jury under the evidence. (*State v. McPherson*, 151.)

LASCIVIOUS COHABITATION.

See Bigamy, 1.

LAWS OF NATURE.

See Evidence, 16.

LAWS OF OREGON.

Cited and Construed in this Volume.

See Table in Front of this Volume.

LEASE.

See Evidence, 18.

See Landlord and Tenant, 9.

Surrender of by Tenant and Acceptance by Landlord.

See Landlord and Tenant, 3.

LEWDNESS.

Lewdness—Evidence—Admissibility.

1. In a prosecution for lewd cohabitation, evidence showing that the conduct of defendant was the subject of criticism in the community was inadmissible, since the question is not whether defendant's conduct was commented upon, but whether it was such as in the mind of a reasonable man would tend to cause scandal, and to induce the belief that the relations between the parties were meretricious. (State v. Naylor, 189.)

LICENSES.

Licenses—Peddlers—Police Power.

1. An ordinance imposing a license on peddlers having no regular place of business in the city, but who solicit therein orders for the sale and future delivery of tea, coffee, spices, etc., cannot be sustained as an exercise of the police power. (Ideal Tea Co. v. Salem, 182.)

See Constitutional Law, 4.

LIENS.

See Judgment, 1.

See Mechanics' Liens.

LOGS AND LOGGING.

Logs and Logging—Damages—Measure.

1. Where a logging contract was breached, plaintiff's measure of damages is the difference between the contract price and the price he would have to pay for logs at the point of delivery, or, if none could be obtained there, the price of logs at the nearest point, plus the cost of transportation, notwithstanding that price would have been too high for the profitable manufacture of lumber. (Williams v. Pacific Surety Co., 210.)

MANDAMUS.**Mandamus—Demurrer—Conclusions.**

1. On petition for *mandamus* to compel a county treasurer to accept the cash, and county warrants tendered in payment of taxes, a defense in an answer admitting the tender and refusal and asserting that the warrants were issued in an attempt to create a voluntary indebtedness in excess of the constitutional limitation, and the pendency of a suit in equity in the Circuit Court of the county and in the United States District Court involving the warrants, was not good as against a demurrer, because it rested largely upon legal conclusions. (Southern Pac. Co. v. Siemens, 62.)

Mandamus—Defects—Cure by Subsequent Pleading.

2. An alternative writ of *mandamus* to compel a county treasurer to accept the cash and county warrants tendered in payment of taxes or to show cause for his refusal was not insufficient as not alleging that the money and warrants, tendered before the commencement of the proceeding, had been brought in the court, where the answer specifically admitted defendant's refusal to accept the tender, and admitted by failure to deny the averment of the petition and of the alternative writ that plaintiff was still ready and willing to make such tender and continued to make it. (Southern Pac. Co. v. Siemens, 62.)

Mandamus—Demurrer—Admissions.

3. In such case, the same allegation as to tender made in the writ was admitted by the demurrer thereto. (Southern Pac. Co. v. Siemens, 62.)

Mandamus—Effect of Pending Suit—Questions Involved.

4. *Mandamus* to compel a county treasurer to accept money and county warrants, previously issued to plaintiff for the amount of plaintiff's overpayment of taxes, in payment of taxes for the following year, was not abated by suits in equity pending in the state Circuit Court and in the United States District Court to enjoin the payment of the warrants on the theory that they were void because representing an indebtedness in excess of the constitutional limitation, since there was a difference in the character of the relief asked for and obtainable in the suits and that relief sought by *mandamus*, and since the suits would not completely adjudicate the questions involved. (Southern Pac. Co. v. Siemens, 62.)

MARRIAGE.

See Bigamy, 2, 3.

See Criminal Law, 17.

MASTER AND SERVANT.**Master and Servant—Employers' Liability Act—Prior Statute.**

1. Where the administrator of a servant of a lumber company, which operated a railroad, killed in the course of his employment on defendant's train, sued to recover \$7,500 damages for the death, the provisions of the Employers' Liability Act (Laws 1911, p. 16), were thereby waived, and reliance placed upon the statute in force prior to such act, Section 6946, L. O. L., regulating the liability of railroad companies for injury to employees, thus rendering the de-

fenses of assumption of risk and negligence of fellow-servant, permissible under such statute, available to the defendant employer. (*Evansen v. Grande Ronde Lumber Co.*, 1.)

Master and Servant—Death of Servant—Evidence—Negative Testimony.

2. In an action against a logging company, operator of a railroad, for the death of a servant through the breaking of a chain, securing logs to a car in motion, testimony of defendant's logging and railway superintendent that, during the 12 years he had been with defendant, he had never known a chain to break, except on that one occasion, was not inadmissible under the rule that the negative testimony of a witness that he did not see an occurrence ordinarily affords no evidence, since such rule has no application to one whose duty, as superintendent of a business or department thereof, is to observe and note the happening of events tending to promote or retard work. (*Evansen v. Grande Ronde Lumber Co.*, 1.)

Master and Servant—Duty to Servant—Safe Appliances—Long Use of Implement.

3. An appliance, such as a chain used in securing logs to a railroad car, that has been used for a long time in safety, may be continued in use without imputation of want of care to the employer thereby, if such appliance has not become obviously dangerous. (*Evansen v. Grande Ronde Lumber Co.*, 1.)

Master and Servant—Injuries to Servant—Sufficiency of Evidence.

4. The purchase, by an employer, of chains to be used by his servants to secure logs to a railroad car, from a reputable manufacturer of chains for such purpose, did not relieve the employer of his duty to the servants of inspection by a competent person as to the fitness and safety of the articles for the use. (*Evansen v. Grande Ronde Lumber Co.*, 1.)

Master and Servant—Injuries to Servant—Sufficiency of Evidence.

5. In an action for death of an employee on a logging company's train, evidence *held* sufficient to support finding that company was not negligent as charged. (*Evansen v. Grande Ronde Lumber Co.*, 1.)

Master and Servant—Evidence—Condition Subsequent to Accident.

6. Evidence of condition of places and ways a few days after the accident was admissible in connection with a showing that the situation had remained unchanged. (*Marks v. Columbia County Lumber Co.*, 22.)

Master and Servant—Assumption of Risk—Employers' Liability Act.

7. The Employers' Liability Act (Laws 1911, p. 16) abrogates the doctrine of assumption of risk in actions coming within its scope. (*Marks v. Columbia County Lumber Co.*, 22.)

Master and Servant—Safe Places and Appliances—Vicariousness of Horse.

8. Where an animal is used by an employer to carry on work under his direction, he is bound to use reasonable diligence to provide a safe animal, and is bound by what he knew or with reasonable dili-

gence might have known as to the docility of the animal. (Marks v. Columbia County Lumber Co., 22.)

Master and Servant—Personal Injuries—Viciousness of Horse—Question for Jury.

9. Evidence that a horse had been in use about the plant for some time, and that the foreman in charge had ample opportunity to observe his conduct when the plaintiff was hurt as well as on former occasions, was sufficient to carry to the jury the question whether the master knew, or with reasonable diligence should have known, the nature of the horse. (Marks v. Columbia County Lumber Co., 22.)

Master and Servant—Safety Devices—Statutory Requirements.

10. Substitutes for safety appliances not within the substantial specification of the Employers' Liability Act (Laws 1911, p. 16) do not take the place of devices specifically named, and devices or things required by a city ordinance will not serve as a substitute for those required by the act. (Harvey v. Corbett, 51.)

Master and Servant—Safety Appliances—Statutory Requirements.

11. Where it did not appear that "tie-in" ropes used to keep a staging from swaying could not be so arranged as not to injure the woodwork of the building, the fact that such woodwork is injured does not excuse noncompliance with the statute requiring such "tie-in" ropes. (Harvey v. Corbett, 51.)

Master and Servant—Independent Contractors—Who are.

12. Where a contract provided that a construction company should be paid a commission as the owner's agent in constructing a building according to plans and specifications, that the principal should pay for all material, but the agent might contract in the name of the principal for labor and material, such contracts to be submitted to the principal for approval, and that the owners had a right to employ a person to inspect any work or materials in the manner of construction, the construction company employed was not an independent contractor. (Harvey v. Corbett, 51.)

Master and Servant—"Independent Contractors"—Who are.

13. Under Employers' Liability Act (Laws 1911, p. 17), Section 2, providing that the manager, superintendent or foreman, or other person in charge of the construction shall be held to be the agent of the employer in all suits for damages by an employee, where a contract for the construction of a building provided that the work should be overseen by a firm of architects, such architects were not independent contractors. (Harvey v. Corbett, 51.)

Master and Servant—Safety Appliances—Statutory Requirements.

14. The Employers' Liability Act provides that, when any staging is used in the construction of a building at a certain height, it must be fastened with lash ropes to keep it from swaying, and the scaffold must also be provided with a guard-rail. While plaintiff was engaged at work upon a scaffold, the supporting ropes slipped, and he fell to the ground and was injured. The lash ropes which had previously been used were ordered taken off by defendant's superintendent. *Held* that, the furnishing of tie ropes being a nondelegable duty, defendants were liable. (Harvey v. Corbett, 51.)

Master and Servant—Assumption of Risk—Employers' Liability Act.

15. Assumption of risk constitutes no defense under the Employers' Liability Act. (*Harvey v. Corbett*, 51.)

Master and Servant—Injuries to Servant—Defenses.

16. Where plaintiff, a stevedore, was hurt in doing work which involved the use of machinery, his cause of action comes within the Employers' Liability Act (Gen. Laws 1911, c. 3), and the defenses of assumption of risk and of negligence of a fellow-servant cannot be urged, nor will plaintiff's own contributory negligence completely bar recovery. (*Kveset v. Grace & Co.*, 83.)

Master and Servant—Injury to Servant—Liability—Employers' Liability Act.

17. An action by an employee injured by the fall of a gin pole while on a steel girder of a gas-tank in process of construction over 70 feet above ground, caused by the negligence of the employer in failing to properly fasten the guy ropes and in recklessly moving the gin pole, may be brought under Employers' Liability Act (Laws 1911, p. 16), providing for the protection and safety of employees constructing or repairing buildings, tanks and other structures. (*Lang v. Camden Iron Works*, 137.)

Master and Servant—Injury to Servant—Employers' Liability Act—Construction—"Negligence."

18. The acts of omission which constitute "negligence" under the Employers' Liability Act are failure to use care in selection and inspection of material, in erection or maintenance of scaffolding or other structure more than 20 feet from the ground, failure to provide a safety rail or other device for protection of employees on such structures, failure to cover dangerous machinery, shafts, or openings, failure to provide a system of signals, failure to use enumerated precautions as to electrical work and contrivances, failure to use every practicable device for the protection of employees in dangerous employments, and failure to use every practicable care and precaution for the safety of employees. (*Lang v. Camden Iron Works*, 137.)

Master and Servant—Injury to Servant—Employers' Liability Act—Construction—"Care and Precaution."

19. The words "every device, care and precaution," in Employers' Liability Act, must be taken in their full sense, except as limited by the context, and the limitation must be construed merely as qualifying the word "device," and the words "care and precaution" apply not only to the safe condition of the machinery considered merely as such, but to the method of its operation. (*Lang v. Camden Iron Works*, 137.)

Master and Servant—Injury to Servant—Action Under Employers' Liability Act—Pleadings.

20. A complaint in an action for injuries to an employee on a girder of a gas-tank in process of construction, caused by the fall of a gin pole, which sets forth facts indicating that the work was hazardous, that the machinery was not properly placed, and was improperly fastened, that the agents in charge of the work were negligent in the maintenance of the gin pole and in the manner of moving it, that they did not use every device, care and precaution which it was practicable for them to use to prevent injury, states a cause of action

within the Employers' Liability Act. (*Lang v. Camden Iron Works*, 137.)

Master and Servant—Injury to Servant—Defective Appliances—Evidence—Admissibility.

21. Where the complaint in an action for injuries to an employee by the fall of a gin pole did not allege that the pole was in itself an improper device, but alleged negligence in maintaining and operating it, evidence of another and better device was inadmissible. (*Lang v. Camden Iron Works*, 137.)

Master and Servant—Injury to Servant—Issues—Instructions.

22. Where the complaint in an action for injury to an employee by the fall of a gin pole did not charge that the pole was an improper device, but only charged that its maintenance and operation in a careless manner caused the injury, an instruction that the jury might consider evidence of another device or method as a means of throwing light on the question of whether the device used was a sufficient one was outside the issues, and prejudicial. (*Lang v. Camden Iron Works*, 137.)

Master and Servant—Injury to Servant—Dangerous Place to Work—Evidence—Question for Jury.

23. Whether an employer was negligent in selecting a tree to which a cable was attached near a place where employees were cutting down trees, *held*, under the evidence, for the jury. (*Niemi v. Stanley Smith Lumber Co.*, 221.)

Master and Servant—Injury to Servant—Negligence—Proximate Cause—Question for Jury.

24. Whether the negligence of an employer was the proximate cause of the death of an employee, *held*, under the evidence, for the jury, under the rule that it is the duty of the jury to look at the facts and ascertain whether they are naturally and probably connected in orderly sequence with the prime cause, or disconnected by some intervening agency affecting its operation. (*Niemi v. Stanley Smith Lumber Co.*, 221.)

Master and Servant—Injury to Servant—Contributory Negligence.

25. Whether an employee injured while cutting down a tree was guilty of contributory negligence, *held*, under the evidence, for the jury. (*Niemi v. Stanley Smith Lumber Co.*, 221.)

Master and Servant—Injury to Servant—Assumption of Risk.

26. Whether an employee injured while cutting down a tree assumed the risk arising from the negligent failure of the employer to furnish a safe place to work, *held*, under the evidence, for the jury. (*Niemi v. Stanley Smith Lumber Co.*, 221.)

Master and Servant—Injury to Servant—Employers' Liability Act.

27. A complaint in an action for the death of an employee cutting a tree which fell on wires attached to another tree, by reason of which the latter tree broke and fell on him, which alleges that the employer negligently selected an unsafe tree to which it attached wires and negligently failed to top the tree selected and to clear the timber from the tree, that by reason thereof the accident hap-

pened and rendered the work of the employee hazardous, states a cause of action, under the Employers' Liability Act (Laws 1911, p. 16), both as to machinery and inherently dangerous occupation. (*Niemi v. Stanley Smith Lumber Co.*, 221.)

Master and Servant—Injury to Servant—Allegation of Negligence—Proof.

28. Where the complaint, in an action for injuries to a cook from the explosion of a gas stove, alleged that the explosion was due to defects in the stove, evidence that the burners had been lighted at least 20 minutes before the explosion did not authorize a recovery by plaintiff; it being incumbent on plaintiff, not only to establish the happening of the accident, but also that it happened on account of the negligence alleged in the complaint. (*Holmberg v. Jacobs*, 246.)

Master and Servant—Injury to Servant—Employers' Liability Act—Applicability.

29. A complaint for injuries to a coal mine employee, which alleged that the employee was engaged in mining coal beneath the surface at such depth as to render the work inherently dangerous from accumulation of noxious and combustible gases, which might be guarded against by the exercise of reasonable care, that the employer failed to install ventilating fans and air shafts, and that by reason thereof the employee, on entering a room in the mine, was burned by an explosion, stated a cause of action under Employers' Liability Act (Laws 1911, p. 16), declaring that all persons having charge of, or responsible for, any work involving risk or danger to the employees shall use every device practicable, and providing that contributory negligence of the person injured shall not be a defense, so that a charge that an employee guilty of contributory negligence could not recover was erroneous. (*Raiha v. Coos Bay Coal & Fuel Co.*, 275.)

Master and Servant—Injury to Servant—Cause of Injury—Nonsuit.

30. Where, in an action for injuries to an electrician's helper from an electric shock while attempting without assistance to extend electric wires, there was evidence from which the jury might have found, either that the proximate cause of the injury was the defendant employer's negligence in failing to furnish deceased with needed assistance, or that the injury was due to a cause in respect to which defendant was not at fault, a nonsuit was properly denied. (*Hartman v. Oregon Elec. Ry. Co.*, 310.)

Master and Servant—Injuries to Servant—Employers' Liability Act.

31. An employee engaged in putting up electric lines and installing lights comes within the protection of the employers' liability law (Laws 1911, c. 3); the work necessarily being dangerous. (*Hartman v. Oregon Elec. Ry. Co.*, 310.)

Master and Servant—Injuries to Servant—Employers' Liability Act.

32. Under employers' liability law (Laws 1911, c. 3), Section 6, declaring that the contributory negligence of a person injured shall not be a defense, but may be taken into account by the jury in fixing the damage, slight carelessness of an employee will not bar recovery for an injury caused by the employee's carelessness and the gross negligence of the employer; but in all cases where there has been any negligence on the part of the employer, the issue of contributory

negligence must be submitted to the jury for comparison. (*Hartman v. Oregon Elec. Ry. Co.*, 310.)

Master and Servant—Injuries to Servant—Workmen's Compensation Act—Applicability.

33. Plaintiff, a teamster, was injured when a lumber truck which he was driving swung around and knocked him off the dock of the defendant lumber company. The truck, which was driven down an inclined driveway, was not equipped with brakes, and it was the custom to drive it so close to the rail that the friction would act as a brake. Owing to the heaviness of the load, the truck swung around. The team with which plaintiff was provided was fractious. *Held*, that the action was governed by Employers' Liability Act (Laws 1911, p. 16), Section 1, declaring that all owners and contractors shall use every device for the protection and safety of their employees; and hence the defenses of contributory negligence and assumption of risk were not available. (*Davis v. Carlton Lumber Co.*, 441.)

Master and Servant—Injuries to Servant—Workmen's Compensation Act.

34. Plaintiff, a teamster, was injured by coming in contact with a mono-rail transfer while driving a wagon on a dock of the defendant. The wagon crowded the horses, one of which was fractious, and plaintiff nearly lost his balance, and in attempting to hold on raised his head, which came in contact with the plank of the mono-rail, which was only six inches above the top of the wagon-bed. *Held*, that plaintiff's action was governed by the Employers' Liability Act (Laws 1911, p. 16), and the master could take advantage of neither the defense of contributory negligence nor assumption of risk; the place of work and appliances being dangerous. (*McGee v. Carlton Lumber Co.*, 446.)

Master and Servant—Employers' Liability Act—Scope—Injuries.

35. Employers' Liability Act (Laws 1911, p. 16), Section 1, requiring all persons having charge of or responsible for any work involving danger to the employee to use every device and precaution practicable for the safety of life and limb, the final clause of which declares that generally all owners or contractors having charge of such work shall use such devices, etc., is not restricted to the particular persons mentioned in the first part of the section, but extends the scope of the statute to all persons having charge of or responsible for any work involving risk or danger to employees. (*Mackay v. Commission of Port of Toledo*, 611.)

Master and Servant—Question for Jury—Dangerous Work.

36. Under such act the question whether the work involved a danger is one of fact to be determined by the jury, rather than a question of law. (*Mackay v. Commission of Port of Toledo*, 611.)

Master and Servant—Employers' Liability Act—Employers Liable—Municipal Corporation.

37. A municipal corporation designated a port, incorporated under Sections 6114-6125, L. O. L., and liable at common law for injury to employees while engaged in actual ministerial work, was subject to the provisions of the Employers' Liability Act. (*Mackay v. Commission of Port of Toledo*, 611.)

MEASURE OF DAMAGES.

See Fraud, 7.

MECHANICS' LIENS.**Mechanics' Liens—Lien Notice—Lump Charge—Nonlienable Items.**

1. If nonlienable items are contained in the lump charge made in a lien notice, no lien is acquired. (*Barr v. World Keepfresh Co.*, 95.)

Mechanics' Liens—Lienable Items—Board and Expenses.

2. The compensation provided by a building contract being the reasonable worth of the labor and material, board and expenses, paid for by the contractor as part of the cost of or compensation for the labor and material, are lienable. (*Barr v. World Keepfresh Co.*, 95.)

Mechanics' Liens—Foreclosure—Complaint.

3. In the absence of attack by demurrer or motion, the complaint in mechanic's lien foreclosure, though not specifically alleging the contract was completed, is sufficient; it alleging the dryer was constructed, and showing that the claim is for services performed and materials furnished in the construction of a dryer. (*Barr v. World Keepfresh Co.*, 95.)

Mechanics' Liens—Foreclosure Decree—Sale of Property.

4. The decree in a mechanic's lien foreclosure should provide that the building and necessary ground be sold together, and not that the building be sold first, and then, if necessary, the ground. (*Barr v. World Keepfresh Co.*, 102.)

Mechanics' Liens—Actions—Evidence.

5. In a suit to establish a mechanic's lien, evidence *held* to show that the laths furnished were of the proper quality. (*Kollock & Co. v. Leyde*, 569.)

Mechanics' Liens—Foreclosure—Evidence.

6. In a suit to foreclose a mechanic's lien, evidence *held* to show that the plaster furnished was of proper quality. (*Kollock & Co. v. Leyde*, 569.)

Mechanics' Liens—Foreclosure—Quality.

7. In a suit to foreclose a mechanic's lien for materials ordered by a carpenter, evidence *held* to show that the owners authorized the orders. (*Kollock & Co. v. Leyde*, 569.)

Mechanics' Liens—Foreclosure—Description.

8. Where householders owned several adjoining lots, a lien statement which correctly gave the number of the house and the description of the block and street is sufficient, under section 7420, L. O. L., though the lot number given was not the lot on which the house was located, for the description would be sufficient, if the lot number was disregarded as surplusage. (*Kollock & Co. v. Leyde*, 569.)

Mechanics' Liens—Foreclosure—Burden of Proof.

9. One seeking to foreclose a mechanic's lien is not bound to show that the materials went into the building; but defendants, desirous of showing that the materials were not used, have the burden of proving that fact. (*Kollock & Co. v. Leyde*, 569.)

MISREPRESENTATIONS.

See Vendor and Purchaser, 1.

MISTAKE.

See Municipal Corporations, 20.

MODIFICATION OF DECREE.

See Divorce, 1.

MOOT QUESTIONS.

See Actions, 1.

See Appeal and Error, 9.

MORTGAGES.

Mortgages—Title of Grantee in Deed Constituting a Mortgage—Evidence.

1. Evidence *held* to justify a finding that the grantee in a deed intended as a mortgage acquired by purchase the absolute title to the property. (*Jones v. Shefler*, 284.)

MOTIONS.

Necessity for Motion to Strike Answer of Witness.

See Appeal and Error, 40.

MOTOR VEHICLES.

Opinion Evidence as to Speed of.

See Evidence, 15, 16.

MUNICIPAL CORPORATIONS.

Municipal Corporations—Public Improvements—Assessment of Benefits—Refund—Parties Entitled.

1. Plaintiff sold land to S., agreeing that if a sewer assessment should be declared valid he would pay it. The assessment was paid by plaintiff. The assessment on another sewer district having been declared invalid, throwing the cost on the whole city, and thus imposing an unjust burden on the property in plaintiff's district, a charter provision was adopted authorizing the city to pay the assessment on both districts and to refund any special assessment paid, and providing for repayment to all property owners who had theretofore paid such sums as might have been paid on account of such special assessments levied against property to which such persons held the record legal title on a specified date subsequent to plaintiff's conveyance. An ordinance was also adopted providing for the repayment to all property owners who had paid by themselves or their grantors any special assessment. The city refunded to S. the amount paid by plaintiff. *Held*, that plaintiff was not entitled to a refund of the amount paid by him, as the charter and ordinance confined the right to refund to those holding the title on the date specified, and, in view of the fact that S.'s property would be burdened with the increased general taxation, this plan of refunding did not seem to be inequitable, and certainly was not so inequitable as to render it obnoxious to law. (*Neer v. Salem*, 42.)

Municipal Corporations—Public Improvements—Assessment of Benefits—Refund—Parties Entitled.

2. The changed method of paying for the sewer did not in itself, irrespective of the ordinance, entitle plaintiff to recover back the amount paid by him. (*Neer v. Salem*, 42.)

Municipal Corporations—Powers of.

3. Where the charter of a city authorized the council to prevent domestic animals from running at large, and to license, tax, impound, sell or kill dogs, the council might prohibit the running of dogs at large, under penalty of their being impounded and ultimately killed. (*Rose v. Salem*, 77.)

Municipal Corporations—Ordinances—Conformity to Charter—Initiative and Referendum.

4. Under Article IV, Section 1a of the Constitution, reserving to the voters of every municipality the initiative and referendum as to all local and special municipal legislation, and Article XI, Section 2, giving the legal voters of every municipality power to enact and amend their municipal charters, though the charter is now adopted by the same body and through the same procedure as the ordinances, it is still the measure of the city's existence and authority, and no ordinance can be adopted which is not within the express or implied powers granted to the city by its charter. (*Robertson v. Portland*, 121.)

Municipal Corporations—Local Improvements—Ordinances—Charter Provisions.

5. Under Portland City Charter of 1913, Section 284, which declares that the provisions of the former charter relating to public improvements by local assessments shall remain in force as ordinances only, the effect of which was to repeal them as charter provisions, those provisions are directly dependent on the charter for their validity and are not invalid as not being based on a charter provision authorizing proceedings for such improvements. (*Robertson v. Portland*, 121.)

Municipal Corporations — Improvements — Charter Provisions — Ordinances.

6. Under Portland City Charter of 1913, Section 284, which declared that the provisions of the former charter relating to public improvements by local assessments, including Sections 400 and 401 thereof, authorizing the adoption of a reassessing ordinance and providing for appeal from such reassessment, should remain in force as ordinances only, those sections remain in force by the terms of the charter, and are not void as no longer based on the authority contained in the charter. (*Portland v. Blue*, 131.)

Municipal Corporations—Improvements—Charter Provisions—Reassessment of Benefit—Change in Charter.

7. Reassessment proceedings under those sections, an appeal from which was pending in the Circuit Court when that charter was adopted, were not interrupted by the change from charter provisions to ordinances, and that appeal can thereafter be determined by the court the same as if the charter had contained an express authorization to enact such ordinances and they had been enacted by the council or voters. (*Portland v. Blue*, 131.)

Municipal Corporations—Obstruction of Streets—Remedy.

8. The right of the owner of the fee of the street to prevent the erection of unlawful structures will be protected by injunction. (*Tooze v. Willamette Valley S. Ry. Co.*, 157.)

Municipal Corporations—Charter Amendments—Initiative—Election.

9. Article IV, Section 1a, of the Constitution, authorizing cities to provide for the manner of exercising the initiative and referendum powers as to municipal legislation, authorizes a city by ordinance to prescribe the manner in which an election to amend the charter by initiative shall be held. (*Pearce v. Roseburg*, 195.)

Municipal Corporations—Amendments of Charters—Elections—Compliance With Ordinance.

10. An ordinance of a city, prescribing the manner for the holding of elections on initiative measures, requires the recorder to give notice of the election, stating therein the measure to be voted on, and requires the council to appoint judges and clerks of election, and to designate voting places, and that on failure so to do, the clerk shall designate the polling places, and the electors present at the time for opening the polls shall elect the judges and clerks. The council, in ordering an election on an initiative charter amendment, did not appoint judges and clerks, nor designate the polling places, but the clerk in the notice of election designated the polling places, and stated that the qualified electors, at the time for opening the polls, would elect judges and clerks. The notice of election was in conformity with the ordinance, and was published as required thereby. *Held*, that the ordinance was complied with and the election valid. (*Pearce v. Roseburg*, 195.)

Municipal Corporations—Initiative Measures—Elections—Validity.

11. Where there was nothing to show that, at a special initiative election in a city to adopt a charter amendment authorizing the creation of indebtedness, any voter not a taxpayer was denied the right to vote, and the evidence showed that 643 votes were cast for the amendment while 78 were cast against it, out of an electorate of over 2,000, the court in determining the validity of the election, would not consider whether Special Laws of 1905, page 36, Section 14, limiting the right to vote to owners of property within the city limits, was in conflict with Article II, Section 2, of the Constitution. (*Pearce v. Roseburg*, 195.)

Municipal Corporations—Initiative and Referendum—Statutes—Validity.

12. So much of Laws of 1915, page 187, as attempts to restrict the powers of cities and towns to levy taxes is violative of Article XI, Section 2, of the Constitution giving to cities and towns the power to enact and amend their charters, subject only to the Constitution and criminal laws of the state, for the Constitution prevents legislative interference with purely local and municipal matters, such as city taxation, and extends to the voters of municipalities full power to regulate these subjects. (*Pearce v. Roseburg*, 195.)

Municipal Corporations—Public Improvements—Construction of Railroads—Description of Terminus of Railroad.

13. An amendment to the charter of a city, which grants to the council thereof power to contract for the construction of a railroad

from the city to a point on the "North Umpqua River at its intersection with the western boundary of the Cascade Range forest reserve," and to issue bonds therefor, sufficiently designates the terminus of the road, though the Cascade Range forest reserve has been, by act of Congress, divided, and that part intersected by the river mentioned is now known as the Umpqua National forest. (*Pearce v. Roseburg*, 195.)

Municipal Corporations—Powers and Functions—Contracts—Judicial Supervision.

14. The court, in a suit by a taxpayer of a city to enjoin it from entering into a contract for the construction of a railroad as authorized by the city charter, will not consider whether the contract is a good business proposition. (*Pearce v. Roseburg*, 195.)

Municipal Corporations—Officers—Liability of.

15. Though the mayor and councilmen of a city received no compensation for such services, they were liable for injuries received by reason of a defective way, where, with notice of the defects, they did not repair them, although authorized by the charter to do so. (*Pullen v. Eugene*, 320.)

Municipal Corporations—Injuries on Streets—Statutes Limiting Recovery—Repeal—Effect.

16. A judgment of \$2,000 against a municipality for personal injuries was set aside because the charter limited a recovery in such cases to \$100. Subsequently such charter provision was repealed, and plaintiff moved for an order directing a judgment upon the verdict. *Held* that, since the repealing enactment did not provide for the maintenance of existing causes of action, plaintiff could not recover more than the amount originally limited. (*Pullen v. Eugene*, 320.)

Municipal Corporations—Public Improvements—Remonstrances—Charter Provisions.

17. The Silverton City charter authorizes the city to improve streets, and provides that the owners of two thirds of the property adjacent to the improvement may file with the council a written remonstrance against a proposed improvement, whereupon it shall not be proceeded with, and that each lot or part thereof shall be liable for the full cost of the improvement of the street abutting thereon. *Held* that, there being no provision whereby the city may select a certain proportion of the depth of an adjoining tract and subject the designated portion to the cost of the improvement, the assessment would naturally fall upon the whole tract, and hence the area of the whole tract, and not merely its front footage, should be considered in determining whether two thirds of the property adjacent to the improvement is represented on a remonstrance. (*Lais v. Silverton*, 434.)

Municipal Corporations—Public Improvements—Suits to Enjoin—Evidence.

18. In a suit to enjoin a street improvement, the evidence was unsatisfactory whether the land represented on a remonstrance against the improvement was two thirds of the land adjacent to the improvement, and, at defendant's request, the case was reopened for further evidence, but the evidence introduced was no more satisfactory than that previously introduced. Thereupon plaintiffs asked for a postpone-

ment until they could have an accurate survey made and procure the testimony of witnesses as to the actual area of the disputed tracts. *Held* that the court should have granted this request. (*Lais v. Silvertown*, 434.)

Municipal Corporations—Public Improvements—Remonstrance.

19. Under a city charter providing that the owner or owners of two thirds of the land next adjacent to a street to be improved may file a written remonstrance against the proposed improvement, an administrator cannot sign a remonstrance on behalf of the real estate of the property under administration. (*Lais v. Silvertown*, 434.)

Municipal Corporations—Plats by Land Owners—Mistake—Recordation—Cancellation.

20. Where the plat of city lots is filed, but the lots are sold according to another unrecorded plat by conveyances which do not conflict, and the two plats do not coincide, the original and recorded plat should be canceled to protect titles acquired under the second plat. (*Miller v. Fisher*, 532.)

Municipal Corporations—Public Improvements—Pavements.

21. Where the patentee offers to all bidders alike the right to make use of the patented article upon reasonable terms, there is no objection to specifying a patented pavement. (*Temple v. Portland*, 559.)

Municipal Corporations—Public Improvements—Patented Pavements.

22. The Portland City Charter (Sp. Laws 1903, p. 3), empowering the council to order a street to be improved, authorizes it to determine the character, kind, and extent of such improvement. Other sections provide for the preparation of plans, authorize remonstrances, and declare that such contract shall be let to the lowest responsible bidder for either the whole of such improvement or part. The city council selected a patented pavement to be used on an improvement, and the contract provided that the contractor should also lay the sidewalks. The holder of the letters patent made no provision for other bidders using the patented pavement, and only the one bid was secured. *Held* that, in view of the fact that sidewalks wholly unconnected with the patented pavement were included in the contract, the acts of the council were void under the charter, because stifling competition. (*Temple v. Portland*, 559.)

Municipal Corporations—Assessments—Objections—Estoppel.

23. That some of the plaintiffs petitioned for a patented pavement, the improvement to be made in conformity with the charter does not estop them from attacking the assessment on the ground that the resolution, by solely specifying the patented pavement, violated the charter provisions for competition. (*Temple v. Portland*, 559.)

Municipal Corporations—Action—Governmental or Ministerial Duty—Improvement of River—"Other Public Corporations."

24. Under Section 358, L. O. L., providing that an action may be maintained against any county and against any of the other public corporations mentioned in Section 357, in its corporate character and within the scope of its authority, or for an injury arising from some act or omission of such other public corporation, a municipal corpora-

tion designated a port, organized under Sections 6114-6125, L. O. L., is within the class of "the other public corporations," and in the execution of the actual work of improving a public highway, a river, was liable for injury to an employee from the breaking of an old, worn ladder furnished as part of the equipment of a dredger. (Mackay v. Commission of Port Toledo, 611.)

See Master and Servant, 37.

NAMES.

Names—Presumption—Identity of Person.

1. Identity of the name of defendant in polygamy with the name in a marriage certificate introduced in evidence primarily connects him with the marriage, under Section 799, subdivision 25, L. O. L., giving as a disputable presumption identity of person from identity of name. (State v. Locke, 492.)

NAVIGABLE WATERS.

Navigable Waters—Tide-lands—Right to.

1. An alien platted a large tract of public land abutting on a stream. Many of these parcels were sold to others. The federal government recognized the titles of the purchasers, confirming them. Thereafter the state granted to the upland owners along the stream all the property of the state lying between high and low water lines. *Held*, that plaintiff, who owned the fee of the upland, acquired the land between high and low water lines, though the plat provided for a highway between high and low water mark; plaintiff taking such lands subject to the easement of the highway. (Tooze v. Willamette Valley S. Ry. Co., 157.)

NEGLIGENCE.

Negligence—Contributory Negligence—Apportioning Damages.

1. Contributory negligence is not a defense, under the Employers' Liability Act (Laws 1911, p. 16), to an action for a servant's injury, but is ground for apportioning the damages according to the respective want of care of the parties. (Raiha v. Coos Bay Coal & Fuel Co., 275.)

See Carriers, 1.

See Master and Servant, 23, 24, 28.

See Railroads, 1.

NEGOTIABLE INSTRUMENTS.

See Bills and Notes, 1-4.

NEW TRIAL.

New Trial—Scope of Remedy.

1. On motion for new trial, the court can only re-examine the facts, and should not consider errors of law. (Pullen v. Eugene, 320.)

New Trial—Grounds—Statute.

2. Section 174, L. O. L., prescribing grounds for granting new trial, does not restrict the court to the grounds specified. (Pullen v. Eugene, 320.)

New Trial—Granting of.

3. Where the court discovers that it erroneously sustained a demurrer to the answer, it may at any time while it has jurisdiction of the cause grant a new trial on its own motion. (*Pullen v. Eugene*, 320.)

See Criminal Law, 3.

Denial of Motion for not Assignable as Error on Appeal.

See Criminal Law, 9.

NONSUIT.

See Criminal Law, 9.

See Landlord and Tenant, 2.

See Master and Servant, 30.

See Trial, 4.

NOTICE.

See Appeal and Error, 12, 17-19, 36.

See Bills and Notes, 1-4.

See Time, 1.

OBJECTIONS.

See Appeal and Error, 8.

See Criminal Law, 6.

See Municipal Corporations, 23.

OBSCENITY.

Obscenity—Immoral Advertising—Indictment—Sufficiency—Statute.

1. Where an indictment for a violation of Section 2095, L. O. L., denouncing the advertising of the treatment or cure of venereal diseases, charged that defendant violated the law "by then and there exposing and exhibiting to the view of a large number of persons and displaying and publishing in the aforesaid county and state, a certain advertisement, to wit, a sign, in words and figures as follows, to wit," then setting out in full the objectionable matter, was sufficient. (*State v. Hollinshead*, 473.)

Obscenity—Police Power—Prohibition of Advertising Venereal Cures.

2. Section 2095, L. O. L., denouncing the offense of advertising venereal cures, was constitutional as a valid exercise of the police power of the state, since it is against public policy to allow interested individuals to disseminate the notion that sexual disease is easily and cheaply cured, as tending to destroy a restraint on immorality. (*State v. Hollinshead*, 473.)

OFFICERS.

See Corporations, 2-5.

Liability for Personal Injuries.

See Municipal Corporations, 15.

OPINION.

See Evidence, 1, 3, 4, 14, 21.

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See Evidence, 2, 8, 17, 18-20.

PARTIES.

Failure to Demur for Defect of Parties.

See Appeal and Error, 32, 38.

PARTITION.

Partition—Decree—Vacation—Evidence.

1. In a suit to set aside a decree of partition, evidence *held* to show that it was a family settlement and was not the result of fraud or oppression. (Howell v. Howell, 539.)

Partition—Decree—Validity.

2. A partition decree, which represented the result of a family settlement made in good faith, will not be disturbed because one attorney acted for all parties, some of whom were infants. (Howell v. Howell, 539.)

Partition—Decrees—Reformation.

3. In a proceeding to reform and set aside a decree of partition, where one of the defendants admitted that she was only entitled to a dower interest instead of a fee, relief will be granted as to her. (Howell v. Howell, 539.)

Partition—Decrees—Proceedings to Set Aside—Evidence.

4. In a proceeding to set aside a partition of land, evidence *held* to show that the improvements on the tract awarded to defendant were made by her. (Howell v. Howell, 539.)

PASSENGERS.**Care Required of Passengers by Street Railroads.**

See Carriers, 1, 2.

PATENTS.**Patents—Exclusive Rights—Constitution.**

1. A holding that a city could not specify and make a patented pavement alone acceptable for a public improvement does not violate the patentee's constitutional right to have the exclusive right to manufacture and sell the patented article. (*Temple v. Portland*, 559.)

Patented Pavements.

See Municipal Corporations, 21-23.

PAVEMENTS.

See Municipal Corporations, 21-23.

PAYMENT.**Payment—Application—Unsecured Debt.**

1. Where one co-owner of land was indebted to the other, the proceeds of sales by the latter will be applied to the unsecured portion of the debt, not to that secured on the land, in the absence of specific directions by the debtor for the application. (*Union Credit Assn. v. Corson*, 361.)

Payment—Receipt—Effect.

2. A receipt is only *prima facie* evidence of its statements. (*United States Fidelity Co. v. Martin*, 369.)

PEDDLERS.

See Constitutional Law, 3, 4.

See Licenses, 1.

PERSONAL INJURIES.

See Animals, 1.

See Appeal and Error, 6, 8.

See Carriers, 1.

See Damages, 2, 4.

See Evidence, 3-5, 10, 13.

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See Release, 1, 5.

See Trial, 1, 5.

PHYSICIANS AND SURGEONS.

See Principal and Agent, 1.

PLATS.

See Municipal Corporations, 20.

PLEADING.**Pleading—Complaint—Sufficiency.**

1. When not attacked by demurrer or motion as not stating the cause of action, every reasonable intendment will be invoked to sustain the complaint after verdict. (*Smith v. National Surety Co.*, 17.)

Pleading—Construction—Admissions.

2. Where the answer in a tenant's action for a sum deposited as security for rent, alleged that the premises were subject to plaintiff's order until November 30th, this was equivalent to saying that they were not subject to his order thereafter; and hence no part of the deposit could be retained by defendant to satisfy any installments of rent after November 30th. (*Meagher v. Eilers Music House*, 70.)

Pleading—Departure—What Constitutes.

3. In a suit to enjoin a railroad company from erecting a trestle on land lying between plaintiff's upland property and low-water mark, the complaint asserted that plaintiff was the absolute owner in fee of all the land on which the trestle was to be built. The reply conceded that a street existed between the platted lines and low-water mark of the river. *Held*, that the reply did not constitute a departure preventing recovery; the concession that a street existed merely diminishing relief to which plaintiff was entitled. (*Tooze v. Willamette Valley S. Ry. Co.*, 157.)

Pleading—Complaint—Cause of Action—Sufficiency.

4. A complaint must state facts sufficient to constitute a cause of action and entitling plaintiff to recover. (*Niemi v. Stanley Smith Lumber Co.*, 221.)

Pleading—Construction—Complaint—Admissions.

5. Where the complaint in an action on a fire policy averred that plaintiff held only as trustee, he cannot contend that the complaint stated a cause of action, because of general averments of unqualified ownership, for the admission qualified the general allegation. (*Howard v. Horticultural Fire Relief*, 349.)

See Boundaries, 2.

See Dismissal and Nonsuit, 1.

See Evidence, 7.

See Fraud, 1, 8.

See Garnishment, 1.

See Indictment, 1.

See Insurance, 1.

See Landlord and Tenant, 6.

See Mandamus, 2.

See Master and Servant, 20.

See Mechanics' Liens, 3.

See Release, 1, 4.

See Trial, 9.

POLICE POWER.

See Constitutional Law, 6.

See Licenses, 1.

See Obscenity, 2.

POLICY.

See Constitutional Law, 10.

See Insurance, 4, 5.

PORTLAND, CHARTER OF.

See Portland v. Blue, 131.

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See Temple v. Portland, 559.

PRESENTMENT.

See Bills and Notes, 1-4.

PRESUMPTIONS.

See Appeal and Error, 2, 15, 32.

See Bigamy, 2.

See Names, 1.

PRINCIPAL AND AGENT.

Principal and Agent—Fraud—Physician—Loss to Plaintiff.

1. Where a physician represents to his patient that he can get some property for her which would be a good investment, and on being made agent of the patient sells his own property to her, the transaction may be rescinded though no loss resulted. (*McNiel v. Holmes*, 165.)

Principal and Agent—Liability of Agent—Evidence.

2. Defendant suggested to plaintiff that he should exchange his farms D. and F. for the property of a third person. Plaintiff gave his consent to defendant attempting to make an exchange, and recognized defendant as his agent, acting in the capacity of real estate broker. Defendant testified that he worked the deal through. By fraud, the farm D. was conveyed to a third person for the benefit of defendant. *Held*, that defendant was the agent of plaintiff, and he could not retain the benefit of the conveyance as against plaintiff, who was not materially injured because he transferred what he was willing to transfer in exchange for the property of the third person. (*Jones v. Sheffer*, 284.)

PRINCIPAL AND SURETY.

Principal and Surety—Action on Bond—Evidence.

1. Where the seller of a sawmill agreed to deliver to the purchaser a certain number of sawlogs, and executed a bond to secure performance, it was proper, in a suit on the bond, to show that the sawmill was of much less value than the amount paid, for the excess was the consideration for the log contract. (*Williams v. Pacific Surety Co.*, 210.)

Principal and Surety—Actions—Defenses.

2. As a surety is only entitled to notice of his principal's default within a reasonable time, it cannot, as a matter of law, be held that plaintiff's failure to give notice for about a month was so unreasonable as to discharge the surety. (*Williams v. Pacific Surety Co.*, 210.)

Principal and Surety—Actions—Defenses.

3. A corporate surety cannot complain of technical breaches of conditions in the bond, unless such breaches cause financial loss. (*Williams v. Pacific Surety Co.*, 210.)

PRIVILEGES AND IMMUNITIES.

See Constitutional Law, 3, 4.

PROXIMATE CAUSE.

See Master and Servant, 24.

PUBLIC IMPROVEMENTS.

See Municipal Corporations, 1, 2, 5-7, 13, 17-19, 21, 22.

QUESTION FOR JURY.

See Landlord and Tenant, 12.

See Larceny, 2.

See Master and Servant, 9, 23-25, 36.

QUIETING TITLE.

Quieting Title—Vendor and Purchaser—Rights of Vendor—Nonperformance.

1. Where a purchaser of land in installments agreed to convey to the vendor a house and lot in satisfaction of one of the installments, but the conveyance was not made, the vendor is entitled to a rescission of the contract, and to its cancellation as a cloud on his title. (*Beno v. Norris*, 506.)

RAILROADS.

Railroads—Injuries to Trespasser—"Negligence."

1. Plaintiff, a minor, was injured by the fall of a bank of earth forming a cave near defendant's right of way in a cut formed by the right of way. Plaintiff had taken refuge in the cave to escape a shower, and after the shower remained there with some companions at play. The wires of the railroad fence in the vicinity were down, and defendant was chargeable with notice of trespass of boys on the track, and might, by reasonable diligence, have acquired knowledge of the cave, which was attractive to children. *Held*, that negligence being an infraction of a legal obligation due from one person to another, and defendant owing no duty to plaintiff, who was a mere trespasser, except not to negligently or recklessly injure him, defendant was not liable. (*Haynes v. Oregon-Wash. B. & N. Co.*, 236.)

RATIFICATION.

See Deeds, 2.

REASSESSMENT.

See Municipal Corporations, 7.

RECEIPT.

See Payment, 2.

RECORD.

See Courts, 1.

Omission from Record.

See Appeal and Error, 37.

REFORMATION.

See Partition, 3.

REFUND.**Parties Entitled to Refund of Assessment Paid.**

See Municipal Corporations, 1, 2.

RELEASE.**Release—Pleading—Fraud.**

1. In a servant's action for injury under the Employers' Liability Act (Laws 1911, p. 16), where the answer traversed the allegations of negligence and affirmatively alleged that plaintiff had made a claim against defendant, that defendant had paid plaintiff \$150, and that plaintiff released defendant from all demands, a reply alleging defendant's representation of payment for lost time and that plaintiff accepted the payment and signed a document which he believed was a receipt for payment for lost time, that its contents were never explained to him to be in complete satisfaction, and that it was procured by misrepresentation, was insufficient to charge defendant's fraud, as it did not state that the document was the release relied upon by defendant, or by whom the information was given to plaintiff, or any duty of the defendant to explain the document. (Ingram v. Carlton Lumber Co., 633.)

Release—Release of One Joint Tort-feasor—Effect.

2. The release of one joint tort-feasor releases all. (Ingram v. Carlton Lumber Co., 633.)

Release—Validity—Representation by Attorney.

3. One who paid an amount to a servant claiming to have an action for injury and procured his release was not required to notify the servant to employ an attorney or someone able to give him business advice. (Ingram v. Carlton Lumber Co., 633.)

Release—Circumstances—Pleading.

4. The duty of giving such notice to the servant, if any, should have been averred with facts showing that plaintiff came within their scope. (Ingram v. Carlton Lumber Co., 633.)

Release—Invalidity—Returning Consideration.

5. In a servant's action for injury, the consideration paid for the release set up by defendant is to be deducted from any greater amount recovered against the defendant. (Ingram v. Carlton Lumber Co., 633.)

REMONSTRANCES.

See Municipal Corporations, 17, 19.

RENTS.

See Dower, 1.

See Evidence, 18.

See Landlord and Tenant, 4-6, 8, 9.

REPEAL.

See Counties, 3.

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RES GESTAE.

See Evidence, 9.

RESULTING TRUST.

See Trusts, 1.

REVIEW.

See Appeal and Error, 3-5, 14, 15, 22, 23, 31, 33, 37, 41, 42.

See Criminal Law, 13.

ROAD DISTRICTS.

See Highways, 1.

ROSEBURG, CHARTER OF.

See Pearce v. Roseburg, 195.

SALEM, CHARTER OF.

See Ideal Tea Co. v. Salem, 182.

See Neer v. Salem, 42.

See Rose v. Salem, 77.

SCHOOLS AND SCHOOL DISTRICTS.

Schools and School Districts—Contract of Hiring—Validity.

1. Under Laws of 1913, pages 301, 304, Sections 7, 17, providing that the school board may hire teachers, and that any duty imposed on the board as a body must be performed at a regular or special meeting, and that the consent to any particular measure obtained of individual members when not in session is not an act of the board, a contract of hiring is not made out where the minutes show that the board at a meeting made a selection of plaintiff as a teacher, but the contract was prepared by the clerk and signed by the members individually after adjournment. (Barton v. School District No. 2, 30.)

Schools and School Districts—Selection of School Site—Majority Vote.

2. Under Laws of 1913, page 303, Section 1, subdivision 14, providing that by a majority vote of any legally called school meeting a schoolhouse site may be selected, but that it shall require a two-thirds vote to order the removal of a schoolhouse, where the chairman announced as business the selection of a site for a new schoolhouse, two nominations being made, the present site of the school and another, the ballot resulting in a majority vote for the new site, the selection of such site by such vote was proper; a two-thirds vote not being required, as in the case of the removal of a school. (Landers v. Van Aukin, 479.)

Schools and School Districts—Tax Levy—Authorization—Statute.

3. Under Laws of 1913, page 300, Section 1, subdivision 5, providing that, if authorized by a majority vote at any school meeting, the district board shall build schoolhouses, etc., and levy a tax, or issue bonds to pay therefor, subdivision 6, providing that the board, when authorized by a majority vote, may, to build a schoolhouse or to buy land for school purposes, issue negotiable warrants evidencing such debt, and levy a tax to pay interest or principal, and, under Section 2, providing that school districts may contract bonded indebtedness to erect a schoolhouse, purchase a site, or to fund outstanding indebtedness, subdivision 4 of the section providing that the board shall levy annually a direct *ad valorem* tax sufficient to pay interest accruing on bonds, where the notice of a special school meeting made no mention that a tax levy would be one of the purposes of the assemblage, but stated that the business would be to vote on the selection of a new schoolhouse site, and upon the question of authorizing the board of directors to borrow money to build a schoolhouse and purchase land for school purposes by negotiating interest-bearing warrants, etc., and where, upon authorization of the meeting, the land was purchased and a tax levied to meet the warrants issued in payment therefor, such tax was not without foundation, because the notice made no express mention that its levy would be one of the purposes of the meeting, since the authorization of the board to incur indebtedness was followed by operation of law by their right to levy a tax to discharge it. (*Landers v. Van Aukin*, 479.)

SESSION LAWS OF OREGON.

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SILVERTON, CHARTER OF.

See *Lais v. Silverton*, 434.

SPLITTING CAUSE OF ACTION.

See Actions, 2.

STATUTE OF FRAUDS.**Frauds, Statute of—Parol Contracts for Sale of Interest in Real Estate—Validity.**

1. Where plaintiff, owning land, encouraged defendant to enter thereon and expend large sums of money in opening a quarry on the faith of an oral agreement by plaintiff to let defendant have the rock for a specified sum, defendant performed his part of the agreement, and he could not be dispossessed by plaintiff on the theory that the agreement was not reduced to writing as required by the statute of frauds, and defendant could enjoin plaintiff from interfering with the possession so long as he continued to carry out the contract and pay the specified price for the rock. (*Dwight v. Giebisch*, 254.)

Frauds, Statute of—Default of Another—Consideration—Sufficiency.

2. Where defendants, the principal stockholders of a hotel company, signed a writing whereby, in consideration of the forbearance of plaintiff to foreclose a mortgage thereon, defendants agreed to pay the sum secured at a later date, together with interest, attorneys' fees, and costs, the undertaking is enforceable; there being a sufficient

memorandum under Section 808, L. O. L., providing that an agreement to answer for the default of another must be in writing embracing the consideration, and subscribed by the party to be charged. (*Davies v. Rea*, 648.)

STATUTES.

Statutes—Indeterminate Sentence Law—Title—Constitutionality.

1. Laws of 1911, page 172, extending and defining the indeterminate sentence, creating a parole board, and limiting its powers and duties, repealing Sections 1723, 1731, L. O. L., and amending Sections 1592, 1724-1730, which dealt with parole and indeterminate sentences when the matter was in the hands of the Governor, instead of the parole board, is not violative of Article IV, Section 20, of the Constitution, providing that every act shall embrace but one subject, and matters properly connected therewith, which subject shall be expressed in the title, since it is unnecessary to state specifically the subject of an amendment of a section of a statute in the title to the amendment; and, if all the provisions of a statute relate directly or indirectly to the same subject, are naturally connected, and are not foreign to the subject expressed in the title, the statute will not be held unconstitutional. (*State v. McPherson*, 151.)

Statutes—Construction—Meaning of Words.

2. The legislature may adopt reasonable modifications of former definitions of words, so as to make their interpretation conform to modern usage. (*Ideal Tea Co. v. Salem*, 182.)

Statutes—Construction—Title of Acts.

3. Laws of 1913, page 266, is entitled an act to prevent the sale or furnishing of intoxicating liquors to any convict or prisoner in the state penitentiary. The body of the act makes it an offense to sell or furnish liquor to any person sentenced to serve, or serving, a term in the penitentiary. Article IV, Section 20, of the Constitution, provides that every act shall embrace but one subject and matters properly connected therewith, which subject shall be expressed in the title. Held that, in view of the restrictive title of the act, it did not apply to paroled convicts not in the penitentiary, and it was no offense for one to furnish them with liquor. (*State v. Perry*, 453.)

Statutes — Title — Amendment — Constitutional Provision — "Sexual" — "Venereal."

4. Under Article IV, Section 20, of the Constitution, providing that every act shall embrace but one subject, that shall be expressed in the title, where the title of Section 2095, L. O. L., denouncing the advertising of cures for sexual disease, was, as originally enacted, entitled "An act to prohibit the advertising of the treatment or cure of venereal or other diseases, declaring the same a misdemeanor and prescribing a penalty therefor" (Laws 1909, p. 229), the title to the amendatory act, reading "An act to amend Section 2095, L. O. L., relating to advertising to cure sexual diseases" (Laws 1913, p. 496), was sufficient, since to refer in the title of an amendatory act to that of the amended act is a sufficient statement of the subject of the amendatory act, while "sexual" is synonymous with "venereal." (*State v. Hollinshead*, 473.)

Statutes—Remedial Statute—Construction.

5. A remedial statute should be construed to give it practical effect according to the lawmakers' intention. (*Landers v. Van Aukin*, 479.)

See Attorney and Client, 2.
 See Bigamy, 1.
 See Constitutional Law, 5.
 See Contempt, 1.
 See Counties, 3.
 See Death, 3.
 See Highways, 1.
 See Intoxicating Liquors, 2, 3.
 See Master and Servant, 1, 10, 11, 14.
 See Municipal Corporations, 12, 16.
 See New Trial, 2.
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 See Schools and School Districts, 3.

STAY OF PROCEEDINGS.

See Appeal and Error, 34, 35.

STREET RAILROADS.

See Carriers, 2.

STREETS.

Property Right of Abutting Owner.

See Eminent Domain, 1.

Remedy for Unlawful Obstruction.

See Municipal Corporations, 8.

SUNDAY.

See Constitutional Law, 6.

TAXATION.

Taxation—Collection—Restraint.

1. Plaintiffs, seeking to enjoin the collection of an illegal tax, who do not tender whatever may legally be due, have no standing in equity. (*Landers v. Van Aukin*, 479.)

See Schools and School Districts, 3.

See Tender, 1.

TENANCY IN COMMON.

Tenancy in Common—Contracts With Third Persons—Rights of Co-tenants.

1. Evidence held to sustain a finding that a tenant in common knew that his cotenant orally agreed with a third person for the acquisition by him of the rock on the land, and where the third person on the faith of the agreement expended large sums in opening a quarry without knowledge of the interest of the tenant in common, the latter could not obtain relief in equity against the third person, but his remedy, if any, was against his cotenant for his share of the royalties obtained from the sale. (*Dwight v. Giebisch*, 254.)

TENDER.**Tender—Payment into Court—Taxes.**

1. Where the county treasurer, defending a *writ* proceeding to compel him to accept cash and county warrants in payment of taxes, admitted that the pleadings showed a tender, ability, and willingness to pay, a continuance of the offer, and a refusal to accept, he could not complain that the writ did not allege that plaintiff performed the futile act of bringing the money and warrants into court. (Southern Pac. Co. v. Siemens, 62.)

THEFT INSURANCE.

See Insurance, 1, 2.

TIDE-LANDS.

See Navigable Waters, 1.

TIME.**Time—Notice of Appeal—Time for Filing—Excluding First or Last Day.**

1. Under Section 550, L. O. L., as amended by Laws of 1913, page 617, requiring notice of appeal to be filed within 60 days from the entry of the decree, a notice of appeal from a decree rendered on April 30th, which was filed on June 30th, was filed in time, since the first day, which is to be excluded from the computation under Section 531, was not the day on which the decree was rendered, but the day following. (United States Nat. Bank v. Shefler, 579.)

See Judgment, 4.

TITLE.

See Statutes, 1, 4.

Tenant No Right to Question Title of Landlord.

See Landlord and Tenant, 7.

Title to Act Shall Embrace but One Subject.

See Statutes, 3.

TORTS.**Liability of County for Torts.**

See Counties, 3.

TRANSCRIPT.**Filing of Transcript is Jurisdictional.**

See Appeal and Error, 25.

TREATIES.**Treaties—Grounds of Obligation.**

1. The fact that, as a matter of comity, Russian consular officers look after the welfare of Bulgarian subjects in the United States does not give Bulgaria any treaty rights enjoyed by Russia, Bulgaria having no treaty with the United States or consular representative. (Franciscovich v. Walton, 36.)

TRESPASS.**Injuries to Trespasser.**

See Railroads, 1.

TRIAL.**Trial—Conduct of Counsel—Reading Statutes to Jury—Action of Court.**

1. Error in permitting counsel for plaintiff suing for a personal injury to read to the jury the Employers' Liability Act was not prejudicial, where the court in its charge instructed the jury that the action was brought under the act and explained it fully. (*Lang v. Camden Iron Works*, 137.)

Trial—Instructions—Refusal of Instructions Covered by Charge Given.

2. Where, in an action for injuries to a street-car passenger, the court charged that the passenger was not required to signal the carmen if she was present at a stopping place when the car stopped, and the carmen knew, or in the exercise of reasonable care should have known, that she was there, intending to board the car, for that constituted an invitation to the public to enter the car, and one desiring to board a car and intending to avail himself of the invitation must put himself reasonably in a situation where it is either known to the carmen that he intends to board the car or in the exercise of reasonable care would be known, refusal of a charge that before the passenger could recover it was necessary to show that she intended to board the car and gave notice to the carmen so that they would know, or in the exercise of reasonable care should have known, that she intended to board the car was not erroneous. (*Tompkins v. Portland Ry., L. & P. Co.*, 174.)

Trial—Instructions—Refusal of Instructions Covered by Charge Given.

3. Where, in an action for injuries to a street-car passenger while attempting to board a car, the court charged that if the passenger attempted to board in the usual way the standing car, and while so doing the carmen, without paying attention to her safety, started the car, causing the injury, she could recover, but if she attempted to board a moving car and by reason thereof was injured, there could be no recovery, refusal to charge that if the car stopped to receive passengers and remained standing for a sufficient length of time to permit all appearing to the conductor, in the exercise of due care, to desire to take passage thereon to do so, and if at the time the conductor gave the signal to proceed the passenger was not in such a position that it was apparent to the conductor that she desired to become a passenger, there was no actionable negligence, was not erroneous. (*Tompkins v. Portland Ry., L. & P. Co.*, 174.)

Trial—Nonsuit—Evidence.

4. Where the testimony for plaintiff, in a personal injury case, leaves the cause of the accident to mere speculation, a nonsuit should be entered. (*Holmberg v. Jacobs*, 246.)

Trial—Personal Injuries—Instructions—Requests.

5. Where no more specific instruction was requested, an instruction charging the jury that, if the servant was permanently injured, they should estimate what he was actually worth as a wage-earner by considering how many years he would have an earning capacity, and

what would be a reasonable wage under the evidence, and should allow compensation only for the damages sustained by the injury, was sufficient. (*McGee v. Carlton Lumber Co.*, 446.)

Trial—Reception of Evidence—Offer of Proof.

6. In an action by an indorsee of a note against the indorser, a corporation, the indorsee was asked to relate what occurred between him and S., the secretary of the corporation, in reference to the note to which question an objection was sustained. Plaintiff then offered to prove that at the time of the indorsement and delivery of the note there was an arrangement between the corporation and himself whereby it assumed the duty of looking after the collection and payment of the note; that later plaintiff made a similar arrangement with defendant's officer, and the officer wrote out a notice to the maker of the note, which plaintiff signed and mailed; that on the day the note became due the maker telephoned to plaintiff that he was not able to pay it, and plaintiff called the officer of the corporation on the telephone, who consented that the maker should be given further time. *Held*, that it was clear that S. was the officer of the corporation referred to with whom the arrangement was made. (*Moll v. Roth Co.*, 593.)

Trial—Requested Instructions—Given Instructions.

7. Requested instructions, which, so far as applicable, were fully covered by the instructions given, were properly refused. (*Mackay v. Commission of Port of Toledo*, 611.)

Trial—Instructions—Assuming Facts.

8. In such action an instruction that, if plaintiff was entitled to a verdict, the jury should assess damages sustained by reason of the injury, with the right to consider the pain and suffering already undergone and the future suffering, the loss of earning capacity, and should determine the sum which would compensate him for his injury, was not objectionable as assuming any fact. (*Mackay v. Commission of Port of Toledo*, 611.)

Trial—Instructions—Pleadings.

9. In a servant's action for injury, where plaintiff claimed that a release set up by defendant had been procured by fraud, but did not plead that the relation of attorney and client existed or was pretended by defendant to exist between plaintiff and the person procuring the release, an instruction on the theory that such relation existed was erroneous, and not in conformity with the pleadings. (*Ingram v. Carlton Lumber Co.*, 633.)

See Criminal Law, 1.

TRUSTS.

Trusts—Resulting Trust—Evidence—Sufficiency.

1. In an action involving title to land, evidence *held* insufficient to show a resulting trust in favor of the defendant; it appearing that her payments of money for the title to the land had been lost because title was in another than the person to whom she paid the money. (*Howell v. Howell*, 539.)

UNDERTAKING.

See Appeal and Error, 24.

Effect of Giving Counter Undertaking on Appeal.

See Appeal and Error, 31.

VACATION.

See Partition, 1.

VENDOR AND PURCHASER.

Vendor and Purchaser—Avoidance of Contract—Sufficiency of Evidence—Misrepresentation.

1. In an action to foreclose a mortgage on residence property sold to defendants by the mortgagee, evidence *held* insufficient to show any misrepresentation by the mortgagee in respect to the removal of a barn and of animals in a park zoo near the premises. (Western Oregon Trust Co. v. Hendricks, 104.)

Vendor and Purchaser—Performance of Conditions—Acceptance.

2. Under a contract for the sale of property, providing that the vendor at his own expense should improve all the streets with hard surface pavement, the purchaser, who demanded that a pavement should be put in a street up to a declivity, admitting that it was impossible to pave the remainder of the street, after such paving had been done to his satisfaction, could not insist that the vendor do an impracticable or impossible thing. (Western Oregon Trust Co. v. Hendricks, 104.)

Vendor and Purchaser—Remedies of Purchaser—Avoidance—Burden of Proof—Breach of Conditions.

3. In an action to foreclose a mortgage on the property sold to defendants by the mortgagee, evidence for defendants *held* not to sustain the burden of proving the mortgagee's failure to perform his contract undertaking to lay water-pipes and construct sewers, or his oral agreement to install gas service, or his oral promise of a street-car line to the property within one year from the contract. (Western Oregon Trust Co. v. Hendricks, 104.)

Vendor and Purchaser—Breach of Conditions—Waiver or Acquiescence.

4. Where purchasers objected to paying interest on their mortgage note until a car line was built to their premises, and the vendor and mortgagee gave them a writing waiving interest until the line was in operation, the purchasers, who thereafter continued to treat the property as their own, would be held to have acquiesced in the settlement offered by the vendor. (Western Oregon Trust Co. v. Hendricks, 104.)

Vendor and Purchaser—Fraud—Evidence.

5. In an action to set aside real estate transactions between physician and patient, evidence *held* to show that complainant was induced to enter into the transaction by the fraudulent representations of defendant. (McNiel v. Holmes, 165.)

Vendor and Purchaser—Fraud—Change of Position.

6. Though a patient, buying land of her physician on the fraudulent representation that it is not his land, does not disaffirm with energetic promptness, after discovery of the fraud, she may rescind;

the position of the physician not having changed. (*McNiel v. Holmes*, 165.)

See Quieting Title, 1.

VERDIOT.

See Appeal and Error, 26.

WAIVER.

See Appeal and Error, 20, 38.

See Bills and Notes, 1-4.

See Criminal Law, 10.

See Vendor and Purchaser, 4.

WARRANTS.

See Counties, 1.

WITNESSES.

Witnesses—Impeachment—Accused as Witness—Character.

1. A defendant, who testifies in her own behalf, can be impeached under the statute by testimony in respect to her moral character the same as any other witness. (*State v. O'Donnell*, 116.)

Witnesses—Impeachment.

2. Where a witness was attempted to be impeached by testimony of another relating to a different time, place and circumstance, from those referred to by the witness, objection to the attempted impeachment was properly sustained. (*State v. McPherson*, 151.)

Witnesses—Cross-examination—Effect.

3. Both the direct and the cross-examination must be treated as evidence given for the party calling the witness, in determining its competency on appeal. (*State v. Naylor*, 139.)

Witnesses—Impeachment—Character.

4. Evidence of the good reputation of a witness for the state for truth was inadmissible where the reputation of such witness had not been impeached, except by contradiction of his testimony; Section 865, L. O. L., providing that the good character of a witness is not admissible until the character of such witness has been impeached. (*State v. Louie Hing*, 462.)

Witnesses—Competent—Wife—Bigamy.

5. Section 1535, L. O. L., as amended by Laws of 1913, page 351, providing that in prosecutions for polygamy the wife of accused shall be a competent witness, and may testify against him, and without his consent, as to the fact of marriage, does not limit her testimony to the marriage ceremony. (*State v. Locke*, 492.)

Witnesses—Error in Evidence—Correction.

6. Where a witness, in an action on a fire policy who had signed the proofs of loss, made a mistake either in his computations or his testimony, another witness may account for the mistake, if the first cannot be recalled. (*Willis v. Horticultural Fire Relief*, 621.)

Witnesses—Examination—Scope.

7. In an action on a fire policy, where the insured, who signed the proofs of loss, was, on cross-examination, asked if the adjuster called his attention to the fact he enumerated 81 iron bedsteads, and it appeared that there had been a mistake in computations, it is proper to allow the insured on redirect examination to testify that the adjuster did not suggest he refresh his memory as to the number of iron bedsteads destroyed by inspecting the ruins, even though it is not the duty of the adjuster to aid the insurer in making proofs of loss. (*Willis v. Horticultural Fire Relief*, 621.)

Impeachment of Witness.

See Criminal Law, 3.

WORDS AND PHRASES.

"Adverse Parties"—*United States Nat. Bank v. Sheffer*, 579.

"Care and Precaution"—*Lang v. Camden Iron Works*, 137.

"Customary"—*Martin v. Fletcher*, 408.

"Debt"—*Southern Pacific Co. v. Siemens*, 62.

"Disinterested Witness"—*Fitzhugh v. Nirschl*, 514.

"Eviction"—*Hotel Marion Co. v. Waters*, 426.

"Independent Contractor"—*Harvey v. Corbett*, 51.

"Negligence"—*Haynes v. Oregon-Wash. R. & N. Co.*, 236.

"Negligence"—*Lang v. Camden Iron Works*, 137.

"Other Public Corporations"—*Mackay v. Commission of Port of Toledo*, 611.

"Peddler"—*Ideal Tea Co. v. Salem*, 182.

"Polygamy"—*State v. Locke*, 492.

"Reasonable"—*Martin v. Fletcher*, 408.

"Sexual"—*State v. Hollinshead*, 473.

"Signed by Himself or Attorney"—*Howard v. Hartford Ins. Co.*, 341.

"Suit upon a Contract"—*Kollock & Co. v. Leyde*, 569.

"Usual"—*Martin v. Fletcher*, 408.

"Venereal"—*State v. Hollinshead*, 473.

WORKMEN'S COMPENSATION ACT.

See Employers' Liability Act.



